136-281

136-284

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 311.

D. P. THOMPSON, RECEIVER, APPELLANT,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED MARCH 29, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 14, 1890.

1 In the Circuit Court of the United States for the District of Oregon. April Term, 1885.

Be it remembered that on the 10th day of July, 1885, there was duly filed in the circuit court of the United States for the district of Oregon a bill of complaint in words and figures as follows, to wit:

2 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the suit of Benjamin Holladay, Plaintiff, against Joseph Holladay, Defendant, Complainant,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, a Corporation, Defendant.

To the judges of the circuit court of the United States for the district of Oregon:

D. P. Thompson, of Portland, Oregon, and a citizen of the State of Oregon, brings this his bill against the Phenix Insurance Company of Brooklyn, a corporation of Brooklyn, in the State of New York, and a citizen of the State of New York.

And thereupon your orator complains and says that your orator now is and ever since the 19th day of May, A. D. 1884, has been the duly appointed, qualified, and acting receiver in the suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, which suit is now and at and during all the times in this bill mentioned was pending and undetermined in the circuit court of the State of Oregon in and for the county of Multnomah.

That the defendant, The Phenix Insurance Company of Brooklyn, is now and at and during all the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having an office and doing business in the State of Oregon as a fire insurance company.

That from the 17th day of November, 1883, to and including the 19th day of May, 1884, and to the appointment and qualification of your orator as herein alleged, one Edward S. Kearney, now and at all the dates and times herein mentioned a citizen of the
3 said State of Oregon, was the duly qualified, appointed, and acting receiver in said suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant.

That from the said 17th day of November, A. D. 1883, continuously up to the time of its destruction by fire, as hereinafter stated, that certain four-story frame building, then and at all said times situate on the northwest corner of North First and F streets, in Portland, Multnomah county, Oregon, and known as the Clarendon Hotel, together with the furniture therein and the land upon which the same was situate, was in the joint possession and under the control of said Edward S. Kearney, as such receiver in said suit of Holladay against Holladay, and R. Koehler and J. N. Dolph, the

one-half interest, undivided, in and to all of said property being owned by said R. Koehler and J. N. Dolph and the title to the remaining undivided one-half thereof being involved and in dispute in said suit of Holladay against Holladay, and being in the possession and under the control of said Edward S. Kearney, as receiver as aforesaid.

4 That in and by the orders appointing your orator and said Edward S. Kearney receiver in said suit of Holladay against Holladay such receiver was directed, authorized, and empowered to take possession of, manage and control, and keep the property above described safely and for the best interests of the parties who should finally be entitled thereto or as the court might direct.

That in the performance of his duty as such receiver the said Edward S. Kearney was, on the 21st day of April, 1884, as such receiver, desirous to insure against loss or damage by fire, for himself as such receiver and for his successors and for the benefit of whom it might concern, the said one-half interest in said Clarendon Hotel building for the sum of four thousand dollars, and the said one-half interest in the said furniture therein for the sum of one thousand dollars while said interests in said property were in said suit involved; that said Edward S. Kearney, receiver as aforesaid and in his capacity and acting as such receiver and not otherwise, was solicited for said insurance by the defendant herein, and that

5 it was on the said 21st day of April, 1884, undertook and agreed between the defendant herein and the said Edward S. Kearney, as such receiver, that the said defendant would insure against loss or damage by fire the said one-half interest in said building and the furniture contained therein, the title to which was involved in said suit of Holladay against Holladay, and make said loss and policy payable to said Edward S. Kearney, as such receiver in said suit of Holladay against Holladay, and his successors and for the benefit of whom it might concern, in the sum of four thousand dollars on the said one-half interest in said building hereinbefore described, and in the sum of one thousand dollars on the said one-half interest in said furniture therein, for the full term of one year from the 27th day of April, 1884, at noon, and that it would receive as premium therefor the sum of three hundred dollars.

And your orator further shows that thereafter, on the 21st day of April, 1884, the said insurance company, with the intent and design to carry into effect said agreement, did cause to be made a writing or policy of insurance, signed by its president and secretary and countersigned by its local agents at Portland, Oregon, bearing date the 21st day of April, 1884, a copy of which is hereunto annexed, marked "Exhibit A," and which your orator prays may be taken as part of this his bill of complaint, and did then and there deliver said policy of insurance to said Edward S. Kearney, the then receiver in said suit, and did receive from him as such receiver the said sum of three hundred dollars premium as aforesaid.

And your orator further says that although when said insurance company, defendant, had so agreed to insure said building and furniture, as hereinbefore stated, and for the amounts as aforesaid, it

was well known to said defendant that said Edward S. Kearney was merely the receiver in said suit of Holladay against
6 Holladay, and that said property so agreed to be insured as aforesaid was in dispute in such litigation, and that said Edward S. Kearney had no interest therein of any nature save as such receiver as aforesaid, and that when said agreement was made and said policy issued he was acting as such receiver, and that the premium therefor was paid out of the moneys in his hands as such receiver, yet by accident and mistake of both said Edward S. Kearney and said defendant said insurance on said property before mentioned was made payable by the terms of said policy to said Edward S. Kearney instead of to the receiver in the suit of Holladay against Holladay and his successors, and for the benefit of whom it might concern, and said policy was issued without the usual clause commonly inserted in such policies and agreed upon, namely, that said insurance was effected for whom it might concern.

And your orator further says that said insurance company, defendant, knew and was distinctly informed by said Edward S. Kearney when said insurance was agreed upon that he, said Kearney, was the mere receiver in said suit and had no personal interest in said property and no interest whatever therein except as receiver in said suit, and was at the same time distinctly informed by said Kearney, and so the fact was, that the said estate of which said Kearney was receiver as aforesaid was the owner of said undivided one-half of said property so sought to be insured, and that such property was in litigation in said suit, and was then in possession of and under the control of said receiver as such and not otherwise; and the said defendant did understand, consent, and agree, and at the time of said agreement to insure said one-half interest in said building and furniture was made with said receiver in said
7 suit, and before said policy of insurance so made to carry said agreement into effect was written and signed, that said insurance was to be made for the benefit of and on account of whosoever was then or might be receiver in said suit, and payable to such receiver and for the benefit and on account of whomsoever was concerned in said suit; and the fact was, and was so understood by said defendant at said time, that said Kearney was not the owner of said property or any part thereof, nor interested therein in any way, except as before stated, and by mere inadvertence, accident, and mistake in writing said policy of insurance it was omitted to be inserted therein that said insurance was made by said receiver as receiver in said suit, and for his successors as such and for the benefit of whom it might concern, and was to be paid in case of loss to the receiver in said suit as such.

And your orator further says that said policy was delivered by said defendant and was received by said Edward S. Kearney in the full belief and understanding that the interest of the parties to said suit of Holladay against Holladay in said building and furniture to the extent of the sums named in said policy was thereby insured and protected by said policy of insurance in accordance

with the directions of said Kearney and in accordance with the understanding and agreement between him and said defendant.

And your orator further says that on the 14th day of May, A. D. 1884, an order was duly made and entered in said circuit court of the State of Oregon for the county of Multnomah, in said suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, accepting the resignation of and removing said Edward S. Kearney as receiver in said suit and appointing your orator as such
8 receiver, said resignation to take effect from the time when his successor qualified and entered upon the performance of his duties as such receiver, and said Kearney was therein and thereby directed that upon your orator duly qualifying as such receiver as aforesaid that said Kearney should deliver to your orator all property by him, said Kearney, held or controlled as receiver in said suit, which embraced, among other things, the said policy of insurance and the property insured or intended to be insured thereby; and your orator says that thereafter and on the 19th day of May, 1884, your orator duly qualified as such receiver.

And your orator further says that on said 19th day of May, 1884, at night and after your orator had duly qualified as such receiver as aforesaid, but before the herein-described or any of the property in said suit involved was delivered to or came into the possession of your orator as such receiver, and while said insured property was still in the possession or under the control of said receiver Kearney, the said hotel building and the furniture therein mentioned and described in said policy of insurance was, without any fault, failure, neglect, or omission on the part of said Kearney or your orator or any other person or persons in any way interested therein, totally destroyed by fire, and a loss was thereby caused to and sustained by said one-half interest in said building to said estate of Holladay against Holladay of more than nine thousand dollars and by said furniture contained therein of more than three thousand five hundred dollars.

And your orator submits that by reason of the premises he is justly and equitably entitled to have said mistake so made in drawing and writing said policy of insurance corrected and said policy reformed by adding therein, after the words "Edward S. Kearney," the words "as receiver in the suit of Benjamin Holladay
9 against Joseph Holladay for and on account of his successors as such receiver and for the benefit of whom it might concern," and that the sum so insured by said defendant on said building and furniture be paid to your orator accordingly.

And your orator further says that subsequent to said 19th day of May, 1884, and long prior to the commencement of this suit, said policy of insurance was delivered by said Kearney to your orator, and that your orator ever since such delivery has been and still is the holder thereof as such receiver.

And your orator further says that said suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, is still pending and undetermined in said circuit court of the State of Oregon for the county of Multnomah.

And your orator further says that previously to the commencement of this suit and since the said fire he applied to and made, requested, and caused application to be made to said defendant to act towards your orator in such a way as is equitable and just and to adjust and pay to your orator the sums so insured by said defendant on said building and furniture as aforesaid and so as aforesaid lost and destroyed by the peril insured against in and by said policy, and exhibited to said defendant the usual and proper proofs of loss more than sixty days prior to the commencement of this suit of your orator's rights and of said loss and of his sole right to receive the same, and that your orator and said Kearney have otherwise in all respects fulfilled all the terms and conditions of said contract on their part; and your orator well hoped that said defendant would have complied with his request and would have yielded to his said application and paid to him the sums so insured by said de-
10 fendant and the amount of such loss as aforesaid, but said defendant has refused and still does refuse to reform said policy or pay said loss or any part thereof, although your orator and his predecessor have complied with all the conditions in said policy contained.

And your orator further says that heretofore, to wit, on the 19th day of July, A. D. 1885, by an order duly made and entered in and by the said circuit court of the State of Oregon for said county of Multnomah in said suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, upon the petition of your orator in that behalf then duly filed in said court and cause, your orator was instructed, directed, and authorized to institute and prosecute this suit and to take all necessary and legal steps, either at law or in equity, in any court having jurisdiction of the parties and of the subject-matter against said defendant to reform said policy of insurance and recover the amount thereof.

So may it please your honors to decree that said policy of insurance be reformed and said mistake corrected so as to be made to contain fully and truly the agreements and understandings of the said receiver and said defendant as hereinbefore set forth and alleged, and that your honors will decree that said defendant do pay unto your orator all moneys due from said defendant by reason of said insurance and loss as aforesaid, to wit, the sum of five thousand dollars, besides interest and the costs and disbursements of this suit, and that your orator may have such other and further or other or further order or relief herein as may be just and equitable.

May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said defendant, thereby commanding it, at a
11 certain day and under a certain pain and penalty to be therein specified, personally to be and appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises as fully to all intents and purposes as if thereunto particularly interrogated, and to stand to, perform, and abide such order and decree herein

as to your honors shall seem meet; and your orator will ever pray, &c.

FECHHEIMER & ACH,
Counsel for Complainant.

12 EXHIBIT "A."

(No. 68722.) ($5,000.)

By this policy of insurance the Phenix Insurance Company of Brooklyn, in consideration of three hundred dollars and subject to and under the conditions hereinafter mentioned, do insure E. S. Kearney, receiver for Holladay *vs.* Holladay, against loss or damage by fire to the amount of five thousand dollars, as follows:

$4,000 on their one-half interest in the four-story frame building occupied as a hotel and known as the "Clarendon Hotel," situate on the northwest corner of North First and F streets, Portland, Oregon; $1,000 on their one-half interest in the hotel furniture while contained therein.

Other concurrent insurance permitted.

Sum insured, $5,000.

And the said Phenix Insurance Company hereby agrees to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified from the twenty-seventh day of April, one thousand eight hundred and eighty-four, at 12 o'clock at noon, to the twenty-seventh day of April, one thousand eight hundred and eighty-five, at 12 o'clock at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after the proofs of the same required by the company shall have been made by the assured and received at the office in Chicago and the loss shall have been ascertained and proved in accordance with
13 the terms and conditions of this policy unless the property be replaced or the company shall have given notice of their intention to rebuild or repair the damaged premises.

1. If an application, survey, plan, or description of the property herein described is taken, whether said application, survey, plan, or description be taken or signed subsequent or prior to the issue of this policy, such application, survey, plan, or description shall be considered a part of this contract and a warranty by the assured, and any false representation by the assured of the condition, situation, or occupancy of the property or any omission to make known every fact material to the risk or any overvaluation or otherwise, or if the assured shall have or shall hereafter make any other insurance (whether valid or not) on the property herein described or any part thereof without the consent of this company written hereon, or the risk be increased by the erection or occupation of neighboring buildings or by any means whatever without the consent of this company endorsed therein; or, if it be a manufacturing establish-

ment, running in whole or in part over or extra time or running at night, or if it shall cease to be operated without a special agreement endorsed on this policy, then and in every such case this policy is void. If the property be sold or transferred, or upon the commencement of foreclosure proceedings against or a sale under a trust deed of or the existence of a judgment lien upon or the issue or levy of an execution against any kind of property herein described, or if the property be assigned under any bankrupt or insolvent law, or any change take place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree or voluntary transfer or conveyance, or if this policy shall be assigned before a loss without the consent of the company endorsed thereon, or if the assured shall keep gunpowder, fire-works, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, or any of its products, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, gasoline, spirit-gas, or any burning fluid or chemical oils, without written permission in this policy, then and in every such case this policy is void.

Time, one year.

14

Rate, 6 %.

2. This insurance does not apply to or cover jewels, watches, plate, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, curiosities, signs, unless particularly specified in this policy, and then not for an amount exceeding the actual cost of same, unless by special agreement in policy.

This company shall not be liable by virtue of this policy or any renewal thereof until the premium therefor be actually paid, nor for any loss by theft at or after a fire, nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, nor for any loss or damage by fire which may happen by means of or during an invasion, insurrection, riot, civil commotion, or military or usurped power, nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire, nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist, nor by lightning, unless specially mentioned, nor for any loss caused by the bursting of a boiler or by explosion from any cause, unless fire-engines, and then only for the loss or damage by the fire.

3. If a building shall fall or any part thereof, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine.

5

Premium, $300.

4. If the interest of the assured in the property be any other than the absolute fee-simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property; or if the building insured stands on leased ground, or if there be a mortgage or other incumbrance thereon it must be so represented to the company and so expressed in the written part of this

policy; otherwise the policy shall be void. When the property shall be sold or encumbered or otherwise disposed of, so that the interest or liability on the part of the assured herein named shall cease or be changed, this insurance on such property shall immediately terminate.

Stamp, $1.00.
Stamp, $1.00.

NOTE.—By "property held in trust" is intended property held under a deed of trust or under the appointment of a court of law, or property held as collateral security, in which latter case this company shall be liable only to the extent of the interest of the assured in such property.

5. If during this insurance the above-mentioned premises shall become vacant or unoccupied, or if the occupation of such premises be changed, except as herein specially agreed to in writing upon this policy, then and from thenceforth, so long as the same shall continue vacant or unoccupied or shall be so appropriated, applied, or used, this policy shall cease and be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire, and in case of failure so to do this company will not be liable for damage caused by such failure and there can be no abandonment to the company of the property described. The use of general
16 terms or anything less than a distinct, specific agreement, clearly expressed and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

7. In case of any other insurance upon the property herein described, whether made prior or subsequent to the date of this policy (whether valid or not), the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured subject to the conditions of average, this policy shall be subject to average in like manner. Any floating, blanket, or general policy or policies attaching in whole or in part to the property covered by this policy shall, as between the assured and this company, be considered as contributing insurance for the full amount of such policy or policies and liable as such to pay *pro rata* any loss, total or partial, on the property herein described.

Reinsurance in case of loss to be settled in proportion as the sum, reinsured shall bear to the whole sum covered by the reinsured company.

When property covered by this policy is damaged by removal from a building exposed to loss by fire, such damage shall be borne by the insurers and insured in such proportion as the whole sum insured bears to the whole value of the property covered, of which proof, in due form required by this policy, shall be made by the claimant so insured.

8. The insurance may be terminated at any time at the request

of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in
17 force. The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any other person other than the assured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever or in any transaction relating to this this insurance.

9. Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance had been made on the same property, giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interest therein; for what purpose and by whom the building insured or containing the property insured and the several parts thereof were used at the time of the loss; when and how the fire originated, and shall produce a certificate, under the hand and seal of a magistrate or notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property described to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations, under oath, by any person appointed by the company either before or after the rendering of the particular account of loss as heretofore provided, and subscribe to such examinations when reduced to writing,
18 and shall also produce their books of account, bills, invoices, and other vouchers, and exhibit the same for examination at the office of the company and permit extracts and copies thereof to be made; the assured shall also produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the property that was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company and as a part of the preliminary proofs of loss. The assured shall, if the claim shall be for building destroyed by fire, if requested so to do, furnish the company with plans or specifications of the buildings destroyed or damaged, which shall be duly verified by the oath of the assured, which said plans and specifications shall be conclusive against the assured as to the plan and description of the property described.

When personal property is damaged the assured shall forthwith cause to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the

company of the whole, naming the quantity, quality, and cost of each article.

10. The amount of sound value and of damage to the property, whether real or personal, covered by this policy or any part thereof may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall then, at the written request of either party, be submitted to competent and impartial arbitrators, one to be selected by each party, the two so chosen, in case of disagreement, to select a third, and the award of any two of whom, in writing under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract nor the liability of this company nor any other question except only the amount of such loss or damage. Each party shall pay their own arbitrator and one-half the cost of the third. It shall be optional with the company to repair, rebuild, or replace the property lost or damaged with like kind and quality within a reasonable time, giving notice of their intention to do so within sixty days after receipt of the proofs herein required, and until such proofs, plans and specifications, declarations and certificates, are produced and examinations and arbitrations permitted by the claimant and had the loss shall not be payable.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners and mortgagees shall be set forth, together with their respective interests therein.

If this policy is made payable in case of loss to a third party or held as collateral security the proof of loss shall be made by the party originally insured, unless there has been an actual sale of the property covered consented to as required by the conditions of this policy. All fraud or attempt at fraud by false swearing or otherwise shall forfeit all claim on this company and shall be a complete bar to any recovery for loss under this policy.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same, and in case of the depreciation of such property from use or otherwise a suitable reduction from the cost of replacing shall be made to ascertain the actual cash value at the time of the fire.

11. All insurance of rents by this policy shall be understood and agreed to upon the terms, conditions, and limitations following: The company shall indemnify the insured from any loss of rent he may sustain by a fire happening within the period limited to the building specified, whereby it shall have become untenantable. The loss shall be computed from the date of the fire and shall cover the actual loss or rent by reason of the premises or part thereof having been rendered untenantable by fire, not exceeding the rate of rent per annum expressed in the policy by the sum insured thereon and for a time not to exceed the period of twelve months nor the time when the building can be made tenantable by the use of due diligence. It is also understood and agreed that the

assured shall proceed without delay and with dispatch to repair or rebuild the damaged or burnt building.

12. This insurance (the risk not being changed) may be continued for such further time as may be agreed on, provided the premium therefor is paid and a receipt given for the same, with the signatures of the president and secretary and countersigned by the regular commissioned agent of the company named thereon, and it shall be considered as continued under the original representations and for the original amounts and divisions unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, at the time of renewal the renewal shall be void.

Whenever this policy may have become void from any cause it shall not be revived or reinstated by the issue of any renewal certificate or receipt or in any other way except by a special contract for such reinstating in writing thereon or by the issuing of a new policy.

21 13. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur, and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

☞ Kerosene oil may be used for lights in dwellings, stores, churches, and school-houses and kept for sale in stores in quantities not exceeding five barrels, to be drawn by daylight only.

☞ Steam-power threshers.—The use of steam power for threshing grain or pressing hay without consent of the company endorsed thereon will avoid this policy. ☞ Gas.—The generating or evaporating within the building or contiguous thereto of any substance for a burning gas or the use of gasoline for lighting will avoid this policy unless permitted in writing hereon. ☞ Fences and other yard fixtures, also furniture and fixtures contained in any building, are not insured under the within policy unless separately and specifically mentioned. ☞ Plate-glass in doors and windows, when of the dimensions of nine feet square or more, and pier or mantel glasses or mirrors are not covered by the insurance on the building, but must be separately and specifically insured. ☞ Frescoed work or gilding on walls or ceilings is not covered by insurance on the building, but must be separately and specifically insured.

22 ☞ Goods in show-windows, where lights are used, must be separately and specifically insured, otherwise they are not covered by this policy. ☞ Builders' risk.—The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics

in building, altering, or repairing the premises named in this policy will avoid the same, unless permission for such work be endorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs without notice or endorsements. ☞ It is hereby understood and agreed by and between this company and the assured that this policy is made with reference to the foregoing terms and conditions as to the classes of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specifically provided for in writing.

In witness whereof the Phenix Insurance Company have caused these presents to be signed by their president and attested by their secretary in the city of Brooklyn, county of Kings, N. Y., but the same shall not be binding until countersigned by White and Riggen, agents for the company at Portland, Oregon.

STEPHEN CROWELL, *President.*

PHILANDER SHAW, *Secretary.*

Countersigned at Portland, Oregon, this 21st day of April, 1884.
WHITE & RIGGEN, *Agents.*

Original endorsed: Filed July 10, 1885. R. H. Lamson, clerk.

23 And afterwards, to wit, on the 11th day of July, 1885, there was issued out of said court a *subpœna ad respondendum* in words and figures as follows, to wit:

24 DISTRICT OF OREGON, *ss:*

I certify that on the 13th day of July, 1885, at Portland, Multnomah county, in said district, I duly served the within *subpœna ad resp.* upon the therein-named defendant, The Phenix Insurance Company of Brooklyn, by exhibiting said writ to Milton W. Smith, its att'y, and by delivering to him personally a true copy of said writ, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled suit, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal,
By P. A. MARQUAM, JR., *Deputy.*

25 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay against Joseph Holladay, Complainant,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

No. 1150. In Equity. *Subpœna ad Respondendum.*

The President of the United States of America to the Phenix Insurance Company of Brooklyn, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of August next, which will be the 3rd day of August, A. D. 1885, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein D. P. Thompson, receiver in the suit of Benjamin Holladay against Joseph Holladay, *are* complainant and you are defendant, and further to do and receive what our said circuit court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Portland, in said district, this 11th day of July, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and —.

Seal of U. S. Circuit Court for Oregon.

R. H. LAMSON, *Clerk*,
By R. B. LAMSON,
Deputy Clerk.

MEMORANDUM.—Pursuant to equity rule No. 12 of the Supreme Court of the United States, the defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said Court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso.*

[Endorsed:] No. 1150. In the circuit court of the United States for the district of Oregon. In equity. D. P. Thompson, receiver, *vs.* The Phenix Insurance Company of Brooklyn. *Subpœna ad respondendum.* Returned and filed July 13, 1885. R. H. Lamson, clerk, by —— ——, deputy clerk.

26 And afterwards, to wit, on the 3rd day of August, 1885, there was duly filed in said court a *preacipe* for appearance of defendant in words and figures as follows, to wit:

27 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay against Joseph Holladay,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, a Corporation.

To the clerk of the above-entitled court:

You will please enter my appearance as solicitor in the above-entitled cause for the defendant above named.

P. L. WILLIS,
Solicitor for Defendant.

Endorsed: Filed August 3, 1885. R. H. Lamson, clerk.

28 And afterwards, to wit, on the 4th day of September, 1885, there was duly filed in said court a demurrer to the bill in words and figures as follows, to wit:

29 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay against Joseph Holladay, Complainant,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

The demurrer of The Phenix Insurance Company of Brooklyn, the above-named defendant, to the complainant's bill of complaint in the above-entitled cause.

This defendant, The Phenix Insurance Company of Brooklyn, by protestation, not confessing or acknowledging all or any of the matters or things in the said complainant's bill to be true in such manner and form as the same are therein set forth, demurs thereto, and for cause of demurrer says that the complainant's said bill of complaint, in case the same were true, which this defendant in no-wise admits, contains not any matter of equity whereon this court can ground any decree or give the complainant any relief or assistance as against this defendant.

That said bill contains no matter showing that the complainant or Edward S. Kearney, the complainant's predecessor in office, was at the time of the making of the alleged contract with the defendant, in the complainant's bill described, authorized by the circuit court of the State of Oregon for the county of Multnomah to enter into such alleged contract.

Wherefore, and for divers other defects and causes of demurrer appearing in the said complainant's said bill, this defendant demurs thereto and humbly demands the judgment of this honorable court whether it shall be compelled to make any answer to the said bill,

and prays to be hence dismissed, with its reasonable costs in
30 this behalf most wrongfully sustained.

WILLIAMS & WILLIS,
Solicitors and Counsel for Defendant.

STATE OF OREGON,
County of Multnomah, } ss:

I, F. V. Andrews, being first duly sworn, say: I am managing agent of the above-named defendant, and that the foregoing demurrer is not interposed for delay.

F. VIGNE ANDREWS.

Subscribed and sworn to before me this 2nd day of Sept., 1885.
[SEAL.] P. L. WILLIS,
Notary Public for Oregon.

I, P. L. Willis, do hereby certify that I am solicitor and counsel for the above-named defendant, and that, in my opinion, the foregoing demurrer is well founded in point of law.

P. L. WILLIS.

STATE OF OREGON,
County of Multnomah, } ss:

Due service of the foregoing demurrer is hereby accepted, at Portland, Oregon, this 4th day of September, 1885, by receiving a copy thereof, duly certified to as such by P. L. Willis, solicitor & counsel for def't.

FECHHEIMER & ACH,
Attorneys for Complainant.

Endorsed: Filed Sept. 4, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy.

31 And afterwards, to wit, on Monday, the 5th day of October, 1885, the same being the 1st judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

32 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN. } No. 1150.

OCTOBER 5, 1885.

Now, at this day, on motion of Mr. Henry Ach, of counsel for the complainant, it is ordered that the demurrer to the bill be, and the same is hereby, set for hearing on Monday, October 12, 1885.

(Signed) DEADY, *J.*

Endorsed: Filed Oct. 5, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy.

33 And afterwards, to wit, on Monday, the 9th day of November, 1885, the same being the 21st judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

34 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver,
vs.
THE PHENIX INSURANCE COMPANY. } No. 1150.

NOVEMBER 8, 1885.

This cause was heard on the demurrer to the bill and argued by Mr. Henry Ach, of counsel for complainant, and by Mr. P. L. Willis, of counsel for defendant; on consideration whereof it is ordered and adjudged that said demurrer be, and the same is hereby, sustained; and thereupon, on motion of the complainant, it is ordered that the complainant have leave to file an amended bill herein with- twenty days herefrom.

(Signed) DEADY, *J.*

Endorsed: Filed Nov. 9, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy.

35 And afterwards, to wit, on the 9th day of November, 1885, there was duly filed in said court an opinion in words and figures as follows, to wit:

36 United States Circuit Court, District of Oregon.

MONDAY, *November* 8, 1885.

D. P. THOMPSON, Receiver,
v.
THE PHŒNIX INSURANCE COMPANY. } No. 1150.

Suit to reform a policy of insurance.

(1.) Limitation on right to sue on a policy of insurance.—A policy of insurance contained in effect this stipulation: (1) No action shall be commenced thereon to recover for a loss thereunder until the amount thereof was ascertained by agreement or arbitration; and (2) no such action shall be maintained unless commenced within one year after the date of the fire from which the loss occurred. Held, that unless the assured was prevented by the action or non-action of the insurer in the matter of ascertaining the amount of the loss, he must commence his action therefor within the time specified in the stipulation.

(2.) Reformation of policy.—A demurrer to a bill for the reformation of a policy of insurance will be sustained when it appears that by reason of the lapse of time no action can be maintained thereon for any cause when reformed. A court will only decree the reformation of an instrument as a means of enabling a party thereto to assert or maintain some right thereunder.

DEADY, *J.*:

On April 21, 1884, the defendant, in consideration of the sum of $300 paid to it by E. S. Kearney, insured him, as "receiver for Holladay *v.* Holladay, in the sum of $5,000 against loss or damage by fire on a half interest in the Clarendon Hotel and furniture for the term of one year from April 27th; and on the night of May 19, 1884, the property was destroyed by fire.

This suit was brought on July 10, 1885, to reform the policy by the plaintiff as the successor of Kearney in said receivership.

The bill alleges that by mistake the policy was made payable to said Kearney "instead of the receiver in said suit of Holladay *v.* Holladay and his successors and for the benefit of whom it might concern," and prays that it may be reformed by adding therein, after the words "E. S. Kearney," the words "'as receiver in the suit of Benjamin Holladay against Joseph Holladay, for and on account of his successors, as such receiver, and for the benefit of whom it might concern;' and that the sum so insured by said defendant on said building and furniture be paid to your orator accordingly."

The defendant demurs to the bill, and for cause of demurrer assigns, among others, the following: "The plaintiff's right is barred because he did not commence this suit within twelve months next after the date of the fire from which the loss occurred."

The policy contains a stipulation to the effect that a loss arising thereunder is not payable until the proof thereof is furnished, and in case of arbitration the award fixing the amount thereof is had; and also this:

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be maintainable in any court of law or chancery until after an award shall be obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

There is no claim that the right to bring this suit has been delayed over a year from the date of the fire from which the loss occurred by any dispute concerning the value of the property destroyed. On the contrary, it appears from the bill that the proof of the loss was duly made and that the amount of — is not contested,

but that the payment thereof is refused to the plaintiff solely on the ground that by the terms of the policy it is payable to Kearney only.

Therefore the question does not arise in this case whether an action could be maintained on this policy by the assured, after the expiration of a year from the date of the fire, in case he had been delayed in the commencement of the same on account of a dispute and arbitration concerning the amount of the loss.

Cases may arise under such a policy when the dispute and arbitration are, without any fault of the assured, so prolonged that unless he is allowed to commence an action after the expiration of a year from the date of the fire he would, under the combined operation of these two stipulations, be deprived of all legal remedy.

But in this case the suit was not brought until 13 months and 21 days after the fire at which the loss occurred, and no excuse or reason is given for the delay.

It is well established that a stipulation limiting the time within which an action may be brought on a policy of insurance is valid and binding on the parties thereto; but that if it is ambiguous, either in itself or taken in connection with other provisions or stipulations in the policy, the ambiguity must be resolved in favor of the assured. See Spare *vs.* Home Mutual Insurance Company, 9 Saw., 135, and cases there cited.

The stipulation for limitation in this policy is, considered by itself, plain and susceptible of but one meaning; and, putting aside the provision concerning an award as inapplicable in this instance, there is nothing in the policy to qualify or render it doubtful.

Unlike the stipulation in Spare *vs.* Home Mutual Insurance Company, *supra*, in which the right to sue was limited to one year from the time the loss "occurred," which, in conjunction with the sixty days also allowed the company to ascertain whether any loss had "occurred" and make payment thereof, was held to mean one year from the expiration of said sixty days, the limitation in this case is a year from a day certain, to wit, the day of the fire, and unless the assured is prevented by the action or non-action of the company in the matter of ascertaining the amount of the loss from commencing an action within that time he must do so or he will be barred therefrom.

But it is said that this is a suit to reform this contract as well as to enforce it, and that the stipulation as to time does not apply to a suit for such relief, and therefore the demurrer is too broad and must be overruled.

But the court will not reform an instrument merely for the sake of reforming it, but only to enable a party to assert some right thereunder, and if an action thereon by the assured to recover the amount of loss is already barred by lapse of time there is no claim that can be asserted under it against the defendant.

In Davidson *vs.* Phœnix Insurance Company, 14 Saw., 594, Mr. Justice Field held, in a case like this, that when the remedy on the policy for the insurance was barred, according to the stipulation

therein, by lapse of time the court would not undertake to reform the instrument, because there was "no occasion" for so doing.

This conclusion is not reached without reluctance. So far as appears, there is, in good morals, no sufficient reason why the defendant should not pay this claim according to the real intention of the parties to the contract—that is, to the receiver for the time being in the case of Holladay *vs.* Holladay, for the benefit of whom it may concern. Such cases as this suggest the necessity of some legislation simplifying the contract of insurance and, within certain limits, declaring its effect, and, in case of loss, who may claim the benefit of it and maintain an action against the insurer to enforce it.

But, as it is, the parties to this contract have deliberately agreed that unless the assured brings his action to recover for the loss within a year from the date of the fire he is forever barred from so doing, and the court cannot disregard the stipulation.

Nor is it intended to suggest that this limitation of the time in which to sue is either unwise or unjust. In this class of cases especially every consideration of justice and convenience requires that claims for losses should be speedily settled while the witnesses are within reach and the facts are fresh in their recollection.

But the law should have come to the aid of this defective contract and authorized the plaintiff to maintain an action thereon to recover this loss, as the successor in office of the person who effected the insurance, for the benefit of whom it might concern, without any reformation of the instrument or delay on that account.

The demurrer is sustained and the bill dismissed.

Mr. Henry Ach for the plaintiff.

Mr. P. L. Willis and Mr. Milton Smith for the defendant.

37 And afterwards, to wit, on the 9th day of November, 1885, there was duly filed in said court a cost bill in words and figures as follows, to wit:

38 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver, &c., Plaintiff,
vs.
THE PHENIX INSURANCE CO. OF BROOKLYN, Defendant. } No. 1150.

Statement of disbursements claimed in the above-entitled cause, viz:

Clerk's fees	$ 90
Marshal's fees	
Costs in lower court	
Advertising	
Depositions	
Attorney's fee	20 00
Attorney's fee for taking — depositions at $2.50 each	
Master's fees	
Referee's fees	

Disbursements .....
Witness fees .....

Total $20 90

[Endorsed:] No. 1150. In the circuit court of the United States for the district of Oregon. D. P. Thompson, plaintiff, *vs.* The Phenix Ins. Co., defendant. Cost bill. Original endorsed: Filed November 9, 1886. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

DISTRICT OF OREGON, *ss:*

I, P. L. Willis, being duly sworn, say: I am solicitor for defendant in the above-entitled cause; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that def't is entitled to recover the same from the complainant.

P. L. WILLIS.

Subscribed and sworn to before me this Nov. 9, 1885.

R. H. LAMSON, *Clerk,*
By R. B. LAMSON,
Deputy Clerk.

39 And afterwards, to wit, on the 25th day of November, 1885, there was duly filed in said court an amended bill of complaint in words and figures as follows, to wit:

40 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay, Plaintiff, against Joseph Holladay, Defendant, Complainant,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, a Corporation, Defendant.

To the judges of the circuit court of the United States for the district of Oregon:

D. P. Thompson, of Portland, Oregon, and a citizen of the State of Oregon, by leave of court first thereunto had, brings this his amended bill against The Phenix Insurance Company of Brooklyn, a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of the State of New York; and thereupon your orator complains and says—

That your orator now is and ever since the 19th day of May, A. D. 1884, has been the duly appointed, qualified, and acting receiver — the suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, which suit is now and at all the times herein mentioned was pending and is undetermined in the circuit court of the State of Oregon for the county of Multnomah.

That the defendant, The Phenix Insurance Company of Brooklyn, is and at all the dates and times herein mentioned was a corporation duly organized, existing, and doing a fire-insurance business under and by virtue of the laws of the State of New York and having an office and doing business in the State of Oregon.

That from the 17th day of November, 1883, to and including the 19th day of May, A. D. 1884, and to the appointment and qualification of your orator as herein alleged, one Edward S. Kearney,
41 now and at all the dates and times herein mentioned a citizen of the State of Oregon, was the duly qualified, appointed, and acting receiver in said suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant.

That from the 17th day of November, A. D. 1883, continuously up to the time of its destruction by fire, as hereinafter stated, that certain four-story frame building then and at all times herein stated situated on the northwest corner of North First and F streets, in the city of Portland, Multnomah county, Oregon, and known as the Clarendon Hotel, together with the furniture therein and the land upon which said building was situate, was in the joint possession and under the control of said Edward S. Kearney as such receiver in said suit of Holladay against Holladay and R. Koehler and J. N. Dolph, the one-half interest undivided in and to all of said property being owned by said R. Koehler and J. N. Dolph, and the title to the remaining undivided one-half thereof being involved and in dispute in suit of Holladay against Holladay and being in the possession and under the control of said Edward S. Kearney as such receiver in said suit as aforesaid.

That in and by the orders appointing your orator and said Edward S. Kearney receiver in said suit of Holladay against Holladay such receiver was directed, authorized, and empowered to take possession of, manage, and control and keep the property above described safely and for the best interests of the parties who should finally be entitled thereto or as the court might direct.

That in pursuance of his duty as such receiver the said Edward S. Kearney was, on the 21st day of April, 1884, as such receiver, desirous to insure against loss or damage by fire for himself as such re-
42 ceiver and for his successors and for the benefit of whom it might concern the said one-half interest in said Clarendon Hotel building for the sum of four thousand dollars, and the said one-half interest in the said furniture for the sum of one thousand dollars, while said interests in said property were in said suit involved; that said Edward S. Kearney, receiver as aforesaid, and in his capacity and acting as such receiver, and not otherwise, was solicited for said insurance by the defendant herein, and that it was, on the said 21st day of April, A. D. 1884, understood and agreed between the defendant herein and the said Edward S. Kearney as such receiver that the said defendant would insure against loss or damage by fire the said one-half interest in said building and the furniture contained therein, the title to which was involved in said suit of Holladay against Holladay, and make said loss and the policy of insurance payable to the said Edward S. Kearney as such receiver in the suit

of Holladay against Holladay and his successors and for the benefit of whom it might concern in the sum of four thousand dollars on the said one-half interest in said building hereinbefore described and the sum of one thousand dollars on the said one-half interest in said furniture therein for the full term of one year from the 27th day of April, A. D. 1884, at noon, and that it would receive as premium therefor the sum of three hundred dollars from said receiver.

And your orator further shows that thereafter, on the 21st day of April, 1884, the said defendant insurance company, with the intent and design to carry into effect said agreement, did cause to be made a writing or policy of insurance, signed by its president and secretary and countersigned by its local agents at Portland, Oregon, bearing date the 21st day of April, 1884, a copy of which is hereunto annexed, marked Exhibit "A," and which your orator prays
43 may be taken as a part of this his bill of complaint, and did then and there deliver said policy of insurance to said Edward S. Kearney, the then receiver in said suit.

And your orator further says that although when said insurance company, defendant, had so agreed to insure said building and furniture as aforesaid and for the amounts as aforesaid it was well known to said defendant that said Edward S. Kearney was merely the receiver in said suit of Holladay against Holladay, and that said property so agreed to be insured as aforesaid was in dispute in said suit, and that said Edward S. Kearney had no interest therein of any nature save as such receiver, and that when said agreement was made and said policy issued he was acting as such receiver, and the premium therefor was to be paid out of the moneys in the hands of the receiver in said suit as such receiver, yet by accident and mistake of both said Edward S. Kearney and said defendant said insurance on said property mentioned was made payable by the terms of said policy to said Edward S. Kearney instead of to the receiver in the suit of Holladay against Holladay and his successors and for the benefit of whom it might concern, and said policy was issued without the usual clause commonly inserted in such policies and agreed upon, namely, that said insurance was effected for whom it might concern.

And your orator further says that said defendant knew and was distinctly informed by said Edward S. Kearney at the time when said insurance was agreed upon that he, the said Kearney, was the mere receiver in said suit and had no personal interest in said property and no interest whatever therein except as receiver in said suit, and was at the time distinctly informed by said Kearney and so the fact was that said property, insured and to be insured,
44 was owned by either the plaintiff or defendant in said suit of Holladay against Holladay, and that said property and the title thereto was in litigation in said suit and was then in possession of and under the control of said receiver as such and not otherwise; and the said defendant did understand, consent, and agree, and at the time of said agreement to insure said one-half interest in said building and furniture was made with said receiver in said suit and before said policy of insurance so made to carry

said agreements into effect was written and signed, that said insurance was to be made for the benefit of and on account of whomsoever was then or might thereafter be receiver in said suit and payable to such receiver in said suit for the benefit and on account of whomsoever was concerned in said suit; that the fact was and is, it was so understood by defendant at said time, that said Kearney was not the owner of said property or any thereof nor interested therein in any way except as before stated, and by mere inadvertence, accident, and mistake in writing said policy of insurance it was omitted to be inserted therein that said in-
45 surance was made by said receiver as receiver in said suit and for his successors as such and for the benefit of whom it might concern, and was to be paid to the receiver in said suit as such in case of loss.

And your orator alleges that said policy was delivered by said defendant and was received by said Edward S. Kearney in the full belief and understanding that the interest of the parties to said suit of Holladay against Holladay in said building and furniture to the extent of the sums named in said policy was thereby insured and protected by said policy of insurance in accordance with the direction of said Kearney and in accordance with the understanding and agreement between him and the said defendant.

And your orator alleges that said defendant did not at once collect the premium due upon said policy, but did extend the customary credit therefor to the receiver in said suit of Holladay against Holladay as such receiver and not otherwise, and that said premium was paid and accepted by said defendant, as is hereinafter more particularly alleged.

46 And your orator further says that on May 14th, 1884, an order was duly made and entered in said circuit court of the State of Oregon for Multnomah county in said suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, accepting the resignation of and removing said Edward S. Kearney as receiver in said suit and appointing your orator as such receiver, said resignation to take effect from the time when his successor had duly qualified and entered — the performance of his duties as such receiver, and said Kearney was therein and thereby directed that upon your orator duly qualifying as such receiver as aforesaid that said Kearney should deliver to your orator all property by him, said Kearney, held or controlled as receiver in said suit, which embraced, among other things, the policy of insurance herein mentioned and the property insured or intended to be insured thereby, and your orator says that thereafter, on May 19th, 1884, he, your orator, duly qualified as such receiver.

And your orator further says that on May 19th, 1884, at night and after your orator had duly qualified as such receiver as
47 aforesaid, but before the herein-described or any of the property in said suit involved was delivered to or came into the possession of your orator as such receiver, and while said insured property was still in the possession and control of said receiver, Edward S. Kearney, the said hotel building and the furniture therein,

and mentioned and described in said policy of insurance, was, without any fault, failure, neglect, or omission on the part of said Kearney or your orator or any other person or persons in any way interested therein, totally destroyed by fire. A loss was thereby caused and sustained by said one-half interest in said building, to whomsoever should be adjudged the owner thereof in said suit, of more than nine thousand dollars and by said furniture contained therein of more than three thousand dollars.

And your orator submits that, by reason of the premises and the payment of said insurance premium as hereinafter alleged, he is justly and equitably entitled to have said mistake so made in drawing and writing said policy of insurance corrected and said policy reformed by adding therein, after the words "Edward S. Kearney," the words "as receiver in the suit of Benjamin Holladay against Joseph Holladay for and on account of his successors as such receiver and for the benefit of whom it might concern," and that the sums so insured by said defendant on said building and furniture be paid to your orator accordingly.

And your orator alleges that subsequent to said May 19th, 1884, and long prior to the commencement of this suit said policy of insurance was delivered by said Kearney to your orator, and that your orator ever since has been and still is the holder thereof as such receiver.

And your orator says that said suit of Holladay against Holladay is still pending and undetermined in said circuit court of
48 Multnomah county, for the State of Oregon.

And your orator further says that he did in all respects comply with and fulfill all conditions and requirements on his part to be performed as required in said policy of insurance, and that he did, more than sixty days prior to the commencement of this suit and immediately after the fire at which said loss occurred, make and deliver to said defendant written notice of said fire, and did, shortly thereafter and as soon as possible and more than sixty days prior to the commencement of this suit, render a particular account of said loss occasioned by said fire to the defendant, which said particular account was signed and sworn to by your orator and did contain therein a statement of other insurance and the written portion of other policies; also the interest of your orator in said destroyed property and the cash value of said property and the use to which said building described as hereinbefore was put and was used, and all other requirements, as contained in section 9 of said policy; that said proofs of loss were duly delivered to and retained by said defendant, and were by said defendant accepted without any manner of objections; that about thirty days after said fire and after the acceptance of said proofs of loss by defendant your orator threatened to commence suit at once to recover said loss and informed the agents of the defendant that he would so do; that thereupon said defendant, by its said duly authorized agents, stated to your orator that under the provisions of said policy of insurance no suit could be brought until sixty days after the receipt of the proofs of loss had elapsed, and directed your orator's attention to the provisions

in said policy limiting the commencement of suit as by said agents; stated that said agents then and there did further represent that there was no question made as to the loss or
49 its payment, except that the company was considering the fact that a change had occurred in the receivership in the cause of Holladay against Holladay; that said agents did then and there further assert and represent to your orator that they had written to said company advising them to pay said loss and informed your orator that the company would undoubtedly so do; that thereafter, on the 27th day of June, A. D. 1884, the said defendant, by its agents, did demand of your orator the payment of the premium upon said policy of insurance, and did at said time further assure and represent to your orator that said loss so insured against by said defendant would undoubtedly be paid as soon as the home office could act thereon; that, acting upon said representation then so made by said defendant, your orator did, on said 27th day of June, A. D. 1884, pay to said defendant the sum of three hundred dollars as a premium on said policy of insurance, and three dollars for the State stamp thereon, which said sums were so accepted and received by said defendant at said time; that said sums were paid by your orator out of the funds in his hands as such receiver as aforesaid; that thereafter, and after the sixty days after the receipt of said proofs by defendant had elapsed, the said defendant, by its said agents, did again and repeatedly assure your orator that defendant would undoubtedly pay said loss as aforesaid; that by reason of said repeated assurances and promises of the said defendant company to your orator, made as aforesaid, he did neglect and fail to and was prevented for some time after sixty days after the delivery to said defendant of the proofs of loss had elapsed to bring his suit upon said policy and to recover the loss sustained by the peril insured against.

And your orator further alleges and says that long prior
50 to the commencement of this suit your orator did apply to and request the said defendant, The Phenix Insurance Company of Brooklyn, to act towards your orator in such a way as is fair, equitable, and just, and to correct and reform said policy of insurance, as hereinbefore alleged, and to adjust and pay to your orator, as receiver as aforesaid in the said case of Holladay against Holladay, the sums so insured against by said defendant company on said building and furniture as aforesaid and so as aforesaid lost and destroyed by the peril insured against in and by said policy; and your orator well hoped that said defendant would have complied with your orator's request and would have yielded to his said application and paid to him the sums so insured by said defendant and the amount of such loss as aforesaid, but that said defendant neglected and refused and still does neglect and refuse to reform said policy or pay said loss or any part thereof, although your orator and his predecessor have complied with all the conditions in policy.

And your orator avers that heretofore, on July 9th, 1885, by an order duly made and entered in and by the said circuit court of the State of Oregon in and for the county of Multnomah in the said

suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, upon the petition of your orator in that behalf, theretofore duly filed in said cause and court, your orator was instructed, directed, and authorized to institute and prosecute this suit and to take all necessary and legal steps, either at law or in equity, in any court having jurisdiction of the subject-matter and parties against said defendant to reform said policy of insurance and recover the amount thereof.

So may it please your honors to decree that said policy of insurance be reformed and said mistake corrected so as to be
51 made to contain fully and truly the agreements and understandings of the said receivers and said defendant as hereinbefore set forth and alleged, and that your honors will decree that said defendant do pay unto your orator all moneys due from said defendant by reason of said insurance and loss as aforesaid, to wit, the sum of five thousand dollars and interest thereon from the time when said loss was payable and the costs and disbursements of this suit, and that your orator may have such other and further relief herein as may seem just and equitable.

So may it please yours honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said defendant, thereby commanding it, at a certain day and under a certain pain and penalty to be therein specified, personally to be and appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises as fully to all intents and purposes as if thereunto particularly interrogated, and to stand to, perform, and abide by such order and decree herein as to your honors shall seem meet; and your orator will ever pray.

FECHHEIMER & ACH,
Att'ys for Complainant.

STATE OF OREGON, } ss:
Multnomah County, }

I, D. P. Thompson, being first sworn, on oath say: I am the complainant above named; that the foregoing bill of complaint is true, as I verily believe.

D. P. THOMPSON,
Receiver in Case of Holladay vs. Holladay.

Subscribed and sworn to before me this the 25th day of November, A. D. 1885.

J. B. THOMPSON, [SEAL.]
Notary Public for Oregon.

52 EXHIBIT "A."

(No. 68722.) ($5,000.)

By this policy of insurance the Phenix Insurance Company of Brooklyn, in consideration of three hundred dollars and subject to and under the conditions hereinafter mentioned, do insure E. S.

Kearney, receiver for Holladay *vs.* Holladay, against loss or damage by fire to the amount of five thousand dollars, as follows:

$4,000 on their one-half interest in the four-story frame building occupied as a hotel and known as the "Clarendon Hotel," situate on the northwest corner of North First and F streets, Portland, Oregon; $1,000 on their one-half interest in the hotel furniture while contained therein.

Other concurrent insurance permitted.

Sum insured, $5,000.

And the said Phenix Insurance Company hereby agrees to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified from the twenty-seventh day of April, one thousand eight hundred and eighty-four, at 12 o'clock at noon, to the twenty-seventh day of April, one thousand eight hundred and eighty-five, at 12 o'clock at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after the proofs of the same required by the company shall have been made by the assured and received at the office in Chicago and the loss shall have been ascertained and proved in accordance with
53 the terms and conditions of this policy unless the property be replaced or the company shall have given notice of their intention to rebuild or repair the damaged premises.

1. If an application, survey, plan, or description of the property herein described is taken, whether said application, survey, plan, or description be taken or signed subsequent or prior to the issue of this policy, such application, survey, plan, or description shall be considered a part of this contract and a warranty by the assured, and any false representation by the assured of the condition, situation, or occupancy of the property or any omission to make known every fact material to the risk or any overvaluation or otherwise, or if the assured shall have or shall hereafter make any other insurance (whether valid or not) on the property herein described or any part thereof without the consent of this company written hereon, or the risk be increased by the erection or occupation of neighboring buildings or by any means whatever without the consent of this company endorsed therein; or, if it be a manufacturing establishment, running in whole or in part over or extra time or running at night, or if it shall cease to be operated without a special agreement endorsed on this policy, then and in every such case this policy is void. If the property be sold or transferred, or upon the commencement of foreclosure proceedings against or a sale under a trust deed of or the existence of a judgment lien upon or the issue or levy of an execution against any kind of property herein described, or if the property be assigned under any bankrupt or insolvent law, or any change take place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process or

Time, one year.

judicial decree or voluntary transfer or conveyance, or if this policy shall be assigned before a loss without the consent of the
54 company endorsed thereon, or if the assured shall keep gunpowder, fire-works, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, or any of its products, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, gasoline, spirit-gas, or any burning fluid or chemical
Rate, 6 %. oils, without written permission in this policy, then and in every such case this policy is void.

2. This insurance does not apply to or cover jewels, watches, plate, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, curiosities, signs, unless particularly specified in this policy, and then not for an amount exceeding the actual cost of same, unless by special agreement in policy.

This company shall not be liable by virtue of this policy or any renewal thereof until the premium therefor be actually paid, nor for any loss by theft at or after a fire, nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, nor for any loss or damage by fire which may happen by means of or during an invasion, insurrection, riot, civil commotion, or military or usurped power, nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire, nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist, nor by lightning, unless specially mentioned, nor for any loss caused by the bursting of a boiler or by explosion from any cause, unless fire-engines, and then only for the loss or damage by the fire.

3. If a building shall fall or any part thereof, except as the
55 result of a fire, all insurance by this company on it or its contents shall immediately cease and determine.
Premium, $300. 4. If the interest of the assured in the property be any other than the absolute fee-simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property; or if the building insured stands on leased ground, or if there be a mortgage or other incumbrance thereon it must be so represented to the company and so expressed in the written part of this policy; otherwise the policy shall be void. When the property shall be sold or encumbered or otherwise disposed of, so that the interest or liability on the part of the assured herein named shall cease or be changed, this insurance on such property shall immediately terminate.

Stamp, $1.00. NOTE.—By "property held in trust" is in-
Stamp, $1.00. tended property held under a deed of trust or under the appointment of a court of law, or property held as collateral security, in which latter case this company shall be liable only to the extent of the interest of the assured in such property.

5. If during this insurance the above-mentioned premises shall become vacant or unoccupied, or if the occupation of such premises be changed, except as herein specially agreed to in writing upon this policy, then and from thenceforth, so long as the same shall continue vacant or unoccupied or shall be so appropriated, applied, or used, this policy shall cease and be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire, and in case of failure so to do this company will not be liable for damage caused by such failure and there can be no abandonment to the company of the property described. The use of general
56 terms or anything less than a distinct, specific agreement, clearly expressed and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

7. In case of any other insurance upon the property herein described, whether made prior or subsequent to the date of this policy (whether valid or not), the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured subject to the conditions of average, this policy shall be subject to average in like manner. Any floating, blanket, or general policy or policies attaching in whole or in part to the property covered by this policy shall, as between the assured and this company, be considered as contributing insurance for the full amount of such policy or policies and liable as such to pay *pro rata* any loss, total or partial, on the property herein described.

Reinsurance in case of loss to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.

When property covered by this policy is damaged by removal from a building exposed to loss by fire, such damage shall be borne by the insurers and insured in such proportion as the whole sum insured bears to the whole value of the property covered, of which proof, in due form required by this policy, shall be made by the claimant so insured.

8. The insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in
57 force. The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any other person other than the assured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever or in any transaction relating to this insurance.

9. Persons sustaining loss or damage by fire shall forthwith give

notice in writing of said loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance had been made on the same property, giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interest therein; for what purpose and by whom the building insured or containing the property insured and the several parts thereof were used at the time of the loss; when and how the fire originated, and shall produce a certificate, under the hand and seal of a magistrate or notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property described to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations, under oath, by any person appointed by the company either before or after the rendering of the particular account of loss as heretofore provided,
and subscribe to such examinations when reduced to writing,
58 and shall also produce their books of account, bills, invoices,
and other vouchers, and exhibit the same for examination at the office of the company and permit extracts and copies thereof to be made; the assured shall also produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the property that was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company and as a part of the preliminary proofs of loss. The assured shall, if the claim shall be for building destroyed by fire, if requested so to do, furnish the company with plans or specifications of the buildings destroyed or damaged, which shall be duly verified by the oath of the assured, which said plans and specifications shall be conclusive against the assured as to the plan and description of the property described.

When personal property is damaged the assured shall forthwith cause to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article.

10. The amount of sound value and of damage to the property, whether real or personal, covered by this policy or any part thereof may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall then, at the written request of either party, be submitted to competent and impartial arbitrators, one to be selected by each party, the two so chosen, in case of disagreement, to select a third, and the award of any two of
whom, in writing under oath, shall be binding and conclusive
59 as to the amount of such loss or damage, but shall not determine the validity of the contract nor the liability of this company nor any other question except only the amount of such

loss or damage. Each party shall pay their own arbitrator and one-half the cost of the third. It shall be optional with the company to repair, rebuild, or replace the property lost or damaged with like kind and quality within a reasonable time, giving notice of their intention to do so within sixty days after receipt of the proofs herein required, and until such proofs, plans and specifications, declarations and certificates, are produced and examinations and arbitrations permitted by the claimant and had the loss shall not be payable.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners and mortgagees shall be set forth, together with their respective interests therein.

If this policy is made payable in case of loss to a third party or held as collateral security the proof of loss shall be made by the party originally insured, unless there has been an actual sale of the property covered consented to as required by the conditions of this policy. All fraud or attempt at fraud by false swearing or otherwise shall forfeit all claim on this company and shall be a complete bar to any recovery for loss under this policy.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same, and in case of the depreciation of such property from use or otherwise a suitable reduction from the cost of replacing shall be made to ascertain the actual cash value at the time of the fire.

60 11. All insurance of rents by this policy shall be understood and agreed to upon the terms, conditions, and limitations following: The company shall indemnify the insured from any loss of rent he may sustain by a fire happening within the period limited to the building specified, whereby it shall have become untenantable. The loss shall be computed from the date of the fire and shall cover the actual loss or rent by reason of the premises or part thereof having been rendered untenantable by fire, not exceeding the rate of rent per annum expressed in the policy by the sum insured thereon and for a time not to exceed the period of twelve months nor the time when the building can be made tenantable by the use of due diligence. It is also understood and agreed that the assured shall proceed without delay and with dispatch to repair or rebuild the damaged or burnt building.

12. This insurance (the risk not being changed) may be continued for such further time as may be agreed on, provided the premium therefor is paid and a receipt given for the same, with the signatures of the president and secretary and countersigned by the regular commissioned agent of the company named thereon, and it shall be considered as continued under the original representations and for the original amounts and divisions unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, at the time of renewal the renewal shall be void.

Whenever this policy may have become void from any cause it

shall not be revived or reinstated by the issue of any renewal certificate or receipt or in any other way except by a special contract for such reinstating in writing thereon or by the issuing of a new policy.

61 13. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur, and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

☞ Kerosene oil may be used for lights in dwellings, stores, churches, and school-houses and kept for sale in stores in quantities not exceeding five barrels, to be drawn by daylight only.

☞ Steam-power threshers.—The use of steam power for threshing grain or pressing hay without consent of the company endorsed thereon will avoid this policy. ☞ Gas.—The generating or evaporating within the building or contiguous thereto of any substance for a burning gas or the use of gasoline for lighting will avoid this policy unless permitted in writing hereon. ☞ Fences and other yard fixtures, also furniture and fixtures contained in any building, are not insured under the within policy unless separately and specifically mentioned. ☞ Plate-glass in doors and windows, when of the dimensions of nine square feet or more, and pier or mantel glasses or mirrors are not covered by the insurance on the building, but must be separately and specifically insured. ☞ Frescoed work or gilding on walls or ceilings is not covered by insurance on the building, but must be separately and specifically insured.

62 ☞ Goods in show-windows, where lights are used, must be separately and specifically insured, otherwise they are not covered by this policy. ☞ Builders' risk.—The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics in building, altering, or repairing the premises named in this policy will avoid the same, unless permission for such work be endorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs without notice or endorsements. ☞ It is hereby understood and agreed by and between this company and the assured that this policy is made with reference to the foregoing terms and conditions as to the classes of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specifically provided for in writing.

In witness whereof the Phenix Insurance Company have caused

these presents to be signed by their president and attested by their secretary in the city of Brooklyn, county of Kings, N. Y., but the same shall not be binding until countersigned by White and Riggen, agents for the company at Portland, Oregon.

STEPHEN CROWELL, *President.*

PHILANDER SHAW, *Secretary.*

Countersigned at Portland, Oregon, this 21st day of April, 1884.

WHITE & RIGGEN, *Agents.*

63 STATE OF OREGON, } *ss:*
County of Multnomah, }

Due service of the within amended bill is hereby accepted, at Portland, Oregon, this 25th day of November, 1885, by receiving a copy thereof, duly certified to as such by Henry Ach, counsel for complainant.

WILLIAMS & WILLIS,
Attorneys for Defendant.

Endorsed: Filed Nov. 25, 1885. R. H. Lamson, clerk.

64 And afterwards, to wit, on the 5th day of December, 1885, there was duly filed in said court a demurrer to amended bill in words and figures as follows, to wit:

65 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay, Plaintiff, *vs.* Joseph Holladay, Defendant, Complainant,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, a Corporation, Defendant.

The demurrer of The Phenix Insurance Company of Brooklyn, the above-named defendant, to the complainant's amended bill of complaint in the above-entitled cause.

This defendant, The Phenix Insurance Company of Brooklyn, by protestation, not confessing or acknowledging all or any of the matters or things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth, demurs thereto, and for cause of demurrer says that the complainant's said amended bill of complaint, in case the same were true, which this defendant in nowise admits, contains not any matter of equity whereon this court can ground any decree or give the complainant any relief or assistance as against this defendant, for the reasons that—

1st. Said amended bill contains no matter showing that the complainant or Edward S. Kearney, the complainant's predecessor in office, was at the time of the making of the alleged contract with

the defendant in the complainant's amended bill described authorized by the circuit court of the State of Oregon for the county of Multnomah to enter into such alleged contract.

2nd. Said amended bill contains matter showing that the complainant's right under the alleged contract with the defendant in said amended bill described is barred because he did not commence this suit within twelve months next after the date of the fire
66 from which the loss described in said amended bill occurred.

Wherefore and for divers other defects and causes of demurrer appearing in the said complainant's said amended bill this defendant demurs thereto and humbly demands the judgment of this honorable court whether it shall be compelled to make any answer to the said amended bill, and prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

WILLIAMS & WILLIS,
Solicitors and Counsel for Defendant.

STATE OF OREGON, } ss:
County of Multnomah, }

I, Milton W. Smith, being first duly sworn, say: I am att'y-in-fact of the above-named defendant, and that the foregoing demurrer is not interposed for delay.

MILTON W. SMITH.

Subscribed and sworn to before me this 5th day of Dec., 1885.
[SEAL.] P. L. WILLIS,
Notary Public in and for the State of Oregon.

I, P. L. Willis, do hereby certify that I am solicitor and counsel for the above-named defendant, and that, in my opinion, the foregoing demurrer is well founded in point of law.

P. L. WILLIS.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within demurrer is hereby accepted at Portland, Oregon, this 5th day of Dec., 1885, by receiving a copy thereof duly certified to as such by P. L. Willis, of counsel for def't.

HENRY ACH,
Of Attorneys for Complainant.

Endorsed: Filed Dec. 5, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy.

67 And afterwards, to wit, on Wednesday, the 30th day of December, 1885, the same being the 49th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

68 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver,
vs.
THE PHENIX INSURANCE COMPANY. } No. 1150.

DECEMBER 30, 1885.

Now, at this day, on motion of Mr. Henry Ach, of counsel for complainant, it is ordered that this cause be, and the same is hereby, set for hearing on the demurrer to the amended bill on Monday, January 4, 1886.

(Signed) DEADY, *J.*

Endorsed: Filed Dec. 30, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy.

69 And afterwards, to wit, on Friday, the 29th day of January, 1886, the same being the 62nd judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

70 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver,
vs.
THE PHENIX INSURANCE COMPANY. } No. 1150.

JANUARY 29, 1886.

This cause was heard on the demurrer to the amended bill, and was argued by Mr. P. L. Willis, of counsel for the defendant, and by Mr. Henry Ach, of counsel for the complainant; on consideration whereof it is ordered that said demurrer be, and the same is hereby, sustained, and that said amended bill be, and the same is hereby, dismissed, and that the defendant do have and recover of and from the complainant his costs and disbursements herein, taxed at —— dollars.

(Signed) DEADY, *J.*

Endorsed: Filed Jan. 29, 1886. R. H. Lamson, clerk.

71 And afterwards, to wit, on the 2nd day of February, 1886, there was duly filed in said court a cost bill in words and figures as follows, to wit:

72 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver, Plaintiff,
vs.
THE PHENIX INS. CO., Defendant. } No. 1150.

Statement of disbursements claimed in the above-entitled cause, viz:

Clerk's fees	$11 20
Marshal's fees	
Costs in lower court	
Advertising	
Depositions	
Attorney's fee	20 00
Attorney's fee for taking — depositions, at $2.50 each	
Master's fees	
Referee's fees	
Disbursements	
Witness fees	
Total	$31 20

[Endorsed:] 1150. In the circuit court of the United States for the district of Oregon. D. P. Thompson, rec'v'r, plaintiff, *vs.* Phenix Ins. Co., defendant. Cost bill. Filed Feb. 2, 1886. R. H. Lamson, clerk, by —— ——, deputy clerk.

DISTRICT OF OREGON, *ss:*

I, P. L. Willis, being duly sworn, say: I am solicitor for defendant in the above-entitled cause; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that def't is entitled to recover the same from the complainant.

P. L. WILLIS.

Subscribed and sworn to before me this 2nd day of Feb., 1886.

R. H. LAMSON, *Clerk,*
By —— ——,
Deputy Clerk.

73 And afterwards, to wit, on the 25th day of June, 1886, there was duly filed in said court an appeal in words and figures as follows, to wit:

74 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay *v.* Joseph Holladay, Complainant,
v.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, in the State of New York, Defendant.
} Suit No. 1150.

The complainant in the above-entitled suit, being aggrieved by the final decree rendered therein and entered on the 28th day of January, 1886, appeals from said final decree and from the whole thereof to the Supreme Court of the United States, and prays that his appeal be in all things allowed, and that a full transcript, in all things complete, as by law provided, and duly authenticated, of the

record, proceedings, and evidence adduced in said suit be transmitted with this appeal to the Supreme Court of the United States.

WILLIAMS, ACH & WOOD,
Solicitors for Complainant.

Endorsed: Filed Jun- 25, 1886. R. H. Lamson, clerk.

75 And afterwards, to wit, on the 25th day of June, 1886, there was issued out of said court a citation on appeal in words and figures as follows, to wit:

76 DISTRICT OF OREGON, *ss:*

I certify that on the 30th day of June, 1886, at Portland, Multnomah county, in said district, I duly served the within citation on appeal upon the therein-named Milton W. Smith by delivering to him personally a true copy of said citation, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal,
By P. A. MARQUAM, JR., *Deputy.*

77 UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

To the Phenix Insurance Company of Brooklyn, in the State of New York, defendant, and to Milton W. Smith, Richard Williams, and P. L. Willis, Esqs., its solicitors, Greeting:

Whereas D. P. Thompson, receiver in the suit of Benjamin Holladay *v.* Joseph Holladay, has lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the district of Oregon in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. eighteen hundred and eighty-six, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this June 25, 1886.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

[Endorsed:] No. 1150. U. S. circuit court, district of Oregon. D. P. Thompson, receiver, &c., *vs.* The Phenix Ins. Co. of Brooklyn, N. Y. Citation on appeal. Endorsed: Filed June 28, 1886. R. H. Lamson, clerk, by —— ——, deputy clerk.

78 And afterwards, to wit, on the 25th day of June, 1886, there was duly filed in said court a bond on appeal in words and figures as follows, to wit:

79 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay *v.* Joseph Holladay, Complainant,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, in the State of New York, Defendant.
} Suit No. 1150.

Know all men by these presents that we, D. P. Thompson, as receiver in the suit of Benjamin Holladay *v.* Joseph Holladay, principal, and George W. Weidler, surety, are held and firmly bound unto The Phenix Insurance Company of Brooklyn, in the State of New York, in the sum of five hundred dollars, to be paid to the said Phenix Insurance Company, its executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 25th day of June, 1886.

Whereas the above-named D. P. Thompson, as receiver as aforesaid, has prayed an appeal to the Supreme Court of the United States to reverse the decree in the above-entitled cause by the circuit court of the United States for the district of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named D. P. Thompson, receiver as aforesaid, shall prosecute said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

D. P. THOMPSON. [L. S.]
GEO. W. WEIDLER. [L. S.]

Signed, sealed, and delivered in presence of—

—— ——.

UNITED STATES OF AMERICA, *District of Oregon*, } *ss*:

I, Geo. W. Weidler, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of one thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

GEO. W. WEIDLER.

Subscribed and sworn to before me this 25th June, 1886.

[NOTARIAL SEAL.] R. L. DURHAM,
Notary Public.

Approved ——, 188–.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, —— ——, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and — holder within said district, and that I am worth, in property situated therein, the sum of — dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

—— ——.

Subscribed and sworn to before me this ——, 188–.

—— ——.

Approved ——, 188–.

[Endorsed:] No. 1150. U. S. circuit court, district of Oregon. D. P. Thompson, receiver, *v.* Phenix Ins. Co. Bond. Approved, Deady, J., June 25, 1886. Filed June 25, 1886. R. H. Lamson, clerk, by —— ——, deputy clerk. Williams, Ach & Wood, att'ys for appellants.

80 DISTRICT OF OREGON, ss:

I certify that on the 30th day of June, 1886, at Portland, Multnomah county, in said district, I duly served the within citation on appeal upon the therein-named Milton W. Smith by delivering to him personally a true copy of said citation, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal,
By P. A. MARQUAM, JR., *Deputy.*

81 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To the Phœnix Insurance Company of Brooklyn, in the State of New York, defendant, and to Milton W. Smith, Richard Williams, and P. L. Willis, Esqs., its solicitors, Greeting:

Whereas D. P. Thompson, receiver in the suit of Benjamin Holladay *v.* Joseph Holladay, has lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the district of Oregon in your favor and has given the security required by law, you are therefore hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. eighteen hundred and eighty-six, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this June 25th, 1886.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

[Endorsed:] No. 1150. U. S. circuit court, district of Oregon. D. P. Thompson, receiver, &c., *vs.* The Phœnix Ins. Co. of Brooklyn, N. Y. Citation on appeal. Filed June 28, 1886. R. H. Lamson, clerk, by —— ——, deputy clerk.

STATE OF OREGON, *County of Multnomah,* } *ss:*

Due and legal service of the within citation is hereby acknowledged, made by a duly certified copy delivered, together with this original, this 28 day of June, 1886.

82 In the Circuit Court of the United States for the District of Oregon.

DISTRICT OF OREGON, *ss:*

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing is a true copy of the record and of all the proceedings, including the opinion of the court, in the cause in equity entitled D. P. Thompson, receiver in the suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, *v.* The Phenix Insurance Company of Brooklyn, in said court determined.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court, at Portland, in said district, this August 16, 1886.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
Clerk U. S. Circuit Court for the District of Oregon.

Endorsed on cover: Oregon C. C. U. S. No. 311. D. P. Thompson, receiver, appellant, *vs.* The Phenix Insurance Company of Brooklyn, New York. Filed March 29, 1887.

IN THE

Supreme Court of the United States.

October Term, 1889.

D. P. THOMPSON, Receiver,

Appellant,

vs.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, N. Y.,

Appellee.

BRIEF FOR APPELLANT.

By SAMUEL SHELLABARGER and JEREMIAH M. WILSON.

McGill & Wallace, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1889.

D. P. THOMPSON, Receiver, Appellant,

vs.

THE PHŒNIX INSURANCE COMPANY, of Brooklyn, Appellee.

STATEMENT.

1. In a suit of Holliday *v.* Holliday, Edward S. Kearney was appointed receiver of certain property, subsequently destroyed by fire.

2. As receiver, he insured the property in the Phœnix Company, of Brooklyn, appellee. The policy insured took effect at noon April 27, 1884, and continued one year (Rec., 27).

3. The policy was written to said Edward S. Kearney, and by mistake the descriptive words, "as receiver," &c., were omitted (Rec., p. 22).

4. May 14, 1884, Kearney was succeeded as receiver by appellant.

5. May 19, 1884, the property was destroyed by fire.

6. July 10, 1885, a bill was filed to reform the policy

so as to make it enure to the benefit of the receiver, and have the amount of the loss decreed to be paid to him by the appellee (Rec., 1–5).

The policy contains a stipulation that no suit shall be brought "unless commenced within twelve months next after the date of the fire from which such loss shall occur." (Rec., 11, par 13).

7. A demurrer was filed to this bill (Rec. p. 14) which was sustained (Rec., p. 16).

8. From the opinion of the Court it appears that the demurrer was sustained on the ground that the bill was not filed within the time stipulated in the policy, that suit thereon should be brought.

9. Pursuant to leave of Court granted, an amended bill was filed, which is set forth in the record, pp. 21–26 inclusive.

This amended bill sets forth specifically the reasons why the suit was not brought within twelve months after the fire occurred, which will be specially mentioned below.

10. To this a demurrer was filed on the grounds—

(*a*) That the Court had not authorized the receiver to insure.

(*b*) That the right of action was barred because suit was not brought within twelve months (Rec., pp. 33, 34).

11. This demurrer was sustained (Rec., p. 35), but the record does not contain any opinion by the Court, but such sustaining was presumably on the grounds set forth in the opinion given on the original bill, already referred to.

12. The case is here on this action of the Court in sustaining this demurrer to the amended bill.

Assignment of Errors.

1. The Court erred in sustaining the demurrer to appellant's bill.

Points.

I.

Assuming that the suit was not in fact brought within the twelve months as meant by the policy, the appellee, by its action, as averred in the bill and admitted by the demurrer, cannot avail itself of the failure to bring the suit within the time stipulated in the policy.

The limitation fixed in the policy has been waived by appellee.

The amended petition demurred to, contains, amongst others, the averments, in substance, following:

About *thirty days* after the fire, and after defendant had accepted the proof of the loss, appellant threatened a suit. Thereupon appellee, by its agents, stated to plaintiff that no suit could be brought until a lapse of sixty days after the furnishing of said proofs of loss (Rec., 24, fol. 48) that said agents of defendant then represented; *there was no question made about the loss or its payment*, except the company was considering whether to pay on account of change in receivership; that they had written to the company advising it *to pay the loss, and informed plaintiff that the company would undoubtedly pay* (fol. 49); loss occurred may 19, 1884 (fol. 46, p. 23); that on *June 27, 1884*, defendant, by its agents, *demanded payment of premium of three hundred dollars upon the policy, and at the same time assured plaintiff that the loss insured against by defendant would undoubtedly be paid as soon as home office could act; that acting on that representation plaintiff did, on the 27th of June, 1884, pay said premium of three hundred dollars, and three dollars for stamp, which were accepted by defendant*

at that time; that said sums were paid by plaintiff out of receiver's funds in his hands; that thereafter, and after the sixty days after receipt of proof, by defendant, had elapsed, defendant did again repeatedly assure plaintiff that defendant would undoubtedly pay the loss; that, by reason of said repeated assurances and promises of defendant made to the plaintiff, as aforesaid, he did neglect and failed to, and was prevented for some time after said sixty days after the delivery to the said defendant of the proofs of loss had elapsed, to bring this suit upon said policy.

All these averments in their full strength are admitted by the demurrer, and the question these admissions present, is, whether they do not constitute a *waiver* of the condition in the policy that the suit should be brought within twelve months after the date of the loss.

In deciding this question of waiver certain facts admitted by the demurrer must be carefully kept in mind.

The loss occurred May 19, 1884; suit was commenced July 10, 1885. One month and twenty-two days (1 month 22 days), therefore, had elasped when the suit was brought in excess of the twelve months' limitation, provided the 12 months began to run at the date of the fire, as we shall see it did not.

The authorities cited below abundantly establish that these conditions in policies of insurance are not favored, and are strictly construed against the insurer. They also establish that whatever of delay was caused by the insurer is to be deducted from the period of limitation; and, if fairly construed, the acts of the insurer, whatever may be their nature, can be held to have caused delay during the period of time which, subtracted from the whole period of delay, reduces the delay to a period less than the period of limitation, there the acts of the insurer constitute a waiver, and the action is maintainable, notwithstanding the delay.

Again, the averments of the bill show that about

thirty days after the fire, the complainant had made up his mind to sue, and threatened such suit, show that strong assurances of payment without suit were made by the insurer, the only objection to payment being about the doubt growing out of the change in receivership. On the 27th of June, 1884, more than a month after the fire, undoubted promises of payment were renewed by the defendant insurer, and on the faith and strength thereof the defendant demanded of the insured, and the insured paid an additional premium of three hundred dollars ($300) on this policy (fol. 49).

Again, that after the expiration of sixty days after insurer had received and approved the proofs of loss, the insurer again, and repeatedly, assured the plaintiff tha the defendant would undoubtedly pay the loss; and the bill avers that these repeated assurances were the cause of the delay in bringing suit which occurred after the right to sue had accrued at the expiration of said sixty days.

And a question is, whether these averments of the bill, so admitted by the demurrer, do not fairly show a delay in bringing the suit of more than a month and twenty-two days as caused by the promises and assurances of the defendant, on which promises and assurances the defendant procured the said additional payment of three hundred dollars ($300) premium after the loss had occurred, and secured the delays of suit as just stated.

Speaking on this point as to waiver in May on Insurance, Sec. 488 (2d Edition), after stating what negotiations for settlement would not be a waiver of the condition in a policy limiting the time within which suit must be brought, the author proceeds in these words:

"If, however, they (the negotiations for settlement) are not prosecuted in good faith, or are made the occasion of delay, a result to which the insurers mainly contribute by *holding out hopes* of an amicable adjustment whereby the insured is led to feel a false security, *this is a waiver.*

So, if the delay for any cause be attributable to the insurers, and the insured be not in fault."

To this is cited a number of cases in notes 3 and 4.

In the case of Grant *v.* Ins. Co., 5 Ind., 26, the head note expresses what, on the present point, was decided in that case in these words:

"Insurers *cannot* take advantage of a stipulation in the policy that an action for a loss shall be barred if not brought *within a specified period where they have been mainly instrumental in producing the delay by holding out hopes of an amicable adjustment.*"

In the body of the opinion (bottom page 26), Court says:

"The record clearly shows that the delay is a result to which the insurance company mainly contributed *by holding out hopes* of an amicable adjustment. She should not, therefore, be permitted to take advantage of her own wrong. * * *

"*Insurance policies are to be liberally construed in favor of the assured;* and an exception is to be strongly construed against the underwriters. 1 Duer on Insurance, 161."

In the case of Ames *v.* New York Union Ins. Co., 4 Kernan, 260, what was decided as to this point is thus stated in the syllabus:

"The policy provided that the loss was to be paid within ninety days after proofs should be completed and filed, and that an action should be barred unless commenced within six months after the loss occurred. The loss occurred on July 5th, and the proofs were served on the 14th of that month. A defect was pointed out by the company *on October 3d*, and supplied by the defendant on the 14th of that month. The secretary of the company when applied to for payment stated that it would not be due until January 14th, when it would be made. The action was commenced January 18th. Held, that defendants had waived the limitation stipulated in the policy."

May on Insurance, in said section 488, proceeds in the following words:

"To the same effect is Curtis *v.* Home Ins. Co., 1 Bissel, 485, where it is stated that *if the conduct of the insurers during the negotiations is such that the insured may reasonably believe that they intend to pay them, the delay is excusable; otherwise not.*"

On this point the said case of Curtis *v.* Ins. Co., 1 Bissel, holds what is expressed in the head note in these words:

"Where a policy of insurance contained a clause that the loss shall be paid within sixty days after it has been ascertained and proved, and under that if the loss is not paid, suit is to be brought within one year after the loss, and the claim was made within a reasonable time, and further proofs required, and the company *held out promises or intimations that it would pay the loss, in consequence of which the plaintiff was prevented from bringing suit within the year. Held, the company cannot be permitted to avail itself of these conditions of the policy.*

"The conduct of the company and the negotiations must be such that the insured as *a reasonable man is convinced that the company will pay the loss, otherwise he is bound to bring his suit within the time.*"

In the case of Killip *v.* Putnam Ins. Co., 28 Wis., 472, the syllabus states, on this point, as follows:

"A clause in the policy limiting the right of action thereon to twelve months after the loss, was valid, but the stipulation might be modified or waived by the parties, or the company might be estopped by its own acts from claiming the benefit thereof.

"Where, by *any* act or omission of the responsible officers and agents of the company, the assured is *induced to suspend for a certain length of time the performance of acts required on his part after a loss; such time should not be reckoned as a part of the period to which the right of action is limited.*"

In the body of the opinion, by Lyon, J. (p. 482), it is stated:

"Provisions limiting the right of action on policies of insurance to much shorter periods than is prescribed by the statute laws of the country for the commencement of similar cases, are almost universally inserted in such policies, and the binding force of those provisions upon the parties to the contracts has been as universally recognized by the Courts. But such contract of limitation, in any given case, like all other stipulations and covenants, may be modified, waived, or extended by the parties thereto, or the party in whose favor the limitation is imposed may be estopped, by his own act or omission, from claiming the benefit of it. * * *

"It does not seem to require much argument to demonstrate that if, by any act or omission of the responsible officers and agents of the defendant, the plaintiff should be induced to suspend action in the premises for a given time, such time should not be deemed a part of the twelve months to which his right of action is limited by the original contract. To hold otherwise would be, in many cases, to allow a person to take advantage of his own wrong."

In *Black et al.* v. *Winnesheik Ins. Co., 31 Wis., 74,* syllabus states as follows:

"A fire insurance policy limited the right of action thereon to twelve months after the loss. A loss occurred October 17, 1869, and on the 6th of November following the parties entered into an agreement by which the assured was to accept a certain amount (less than what he claimed to be due by the terms of the policy), and the company promised to pay that amount on the 6th of February, 1870, unless it should notify the assured before that time of its intention to contest its liability for the loss. No such notification having been given, nor the amount agreed upon paid, the assured brought this action November 7, 1870. Held, that even if plaintiffs could not recover on the agreement aforesaid, *they might still maintain an action on the policy; and the time between November 6, 1869, and February 6, 1870, must be excluded from the period of limitation.*"

Davis v. *Canada Farmers Mutual Ins. Co., 39 Upper Canada (Queen's Bench), 467*, it is stated that—

"Where the delay to bring the action can be *justly said to be the act of the company, and not of the plaintiff, the company will not, in any case, be allowed to take advantage of its own wrong, and will be prevented from setting up the limitation clause to defeat the action or suit.*"

In the case of Derrick *v.* Lamar Ins. Co., 74 Ill., 404, syllabus states as follows:

"A clause in an insurance policy limiting the right of action on the policy to a specified period of time is waived if the company, by fraud, *or by holding out reasonable hopes of an adjustment, prevent the assured from bringing suit within the time limited.*"

In Peoria Marine and Fire Ins. Co. *v.* Whitehill, 25 Ill., 466, in the body of the opinion, the Court say:

"Where an insurance company shall, by fraud, *or by holding out reasonable hopes of an adjustment, deter a creditor assured being under such a condition to sue, from commencing his suit, he honestly confiding in the pretenses and promises of the assurer, the condition would be no bar, but in such a case there should be proper averments in the declaration of the facts.*"

Should it be contended that the waiver of the condition, that suit must be brought within twelve months, cannot arise in this case because of the stipulation (Rec., 29, fol. 55, 56) which provides that "the use of general terms or anything less than a distinct specific agreement clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed condition or restriction therein," then we reply that said clause regarding waiver has no application to conditions depending upon acts to be done after the loss.

On this point May on Insurance, Sec. 511, states as follows:

"A clause in a policy of insurance that 'nothing but

a distinct specific agreement, clearly expressed and indorsed on the policy, shall operate as a waiver of any printed or written condition, warranty, or restriction thereon,' refers to those conditions and provisions of the policy which enter into and form a part of the contract of insurance, and are essential to make it a binding contract between the parties, and which are properly designated as *conditions*, and not to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proof of the loss." (Citing Franklin Fire Ins. Co. *v.* Chicago Ice Co., 36 Md., 102; May on Insurance, Secs. 363, 473.)

Regarding that stipulation of the policy which, in substance, provides that the parties procuring the insured to take out the policy shall be deemed the agents of the insured and not of the insurer, we state that the same will not be held by the courts to be effective or of any force as against the acts of the agent of the insurer, which have been by the insured, acted on in good faith as the acts of the company.

In the present case the agents of the insured more than a month after the loss, and after the insurer knew of the loss, induced the complainant to pay three hundred dollars premium on the loss, under the most undoubted assurances that the loss would be paid.

By this means they induced delay from time to time, from month to month, in prosecuting the suit. It would be a most flagrant fraud to allow the insurer, after thus collecting, through said agents, on a loss already actually incurred, and after inducing the delay of this suit for months, to repudiate these agents of theirs, and their acts, this, under any clause in the policy such as that just named, or under any other pretense.

And on this point this court has authoritively spoken in Insurance Company *v.* Wilkenson, 13 Wallace, 222.

We quote from the opinion of Justice Miller in that case (p. 234, *et seq.*), as follows:

"This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured; and if left to himself, or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known—so well, that no Court would be justified in shutting its eyes to it—that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents *all over the land*, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. *They pay these agents large commissions on the premiums thus obtained*, and the policies are delivered at their hands to the assured. The agents are *stimulated* by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has *persuaded* him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that *the reports of judicial decisions are filled* with the efforts of *these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the* premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, *at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion*, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. *The ten-*

dency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals." (Citing here 25 Conn., 51; 8 Wright, 259; 16 Wisconsin, 241; 17 Iowa, 276.)

"*An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.*" (*31 Conn., 517; 40 Missouri, 557; 17 Iowa, 176; 11 Harris, 50.*)

"In the fifth edition of American Leading Cases, after a full consideration of the authorities, it is said:

"'By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers.'"

The case of Wilkenson is followed and approved in many of the subsequent cases, amongst others, in—

Insurance Company *v.* Mahone, 21 Wall., 152–155.
New Jersey Insurance Co. *v.* Baker, 94 U. S. 610.
Eames *v.* Home Insurance Co., 94 U. S., 630.

But citation of authority to show that the insurance agents of defendant, acting as such in Oregon, were agents, notwithstanding any stipulation in the policy, for the purpose of making said promises to pay without suit, are here really unnecessary, because the averments of the bill are explicit that the persons making these promises and assurances were "the duly authorized agents of the defendant" in the premises, and this is,

therefore, admitted by the demurrer. We have cited the language of Justice Miller from the case of Insurance Co. *v.* Wilkenson, *supra*, mainly for the purpose of showing the general methods, practices and resorts of insurance companies, throughout this country, in getting, through the "stimulated" agencies which they establish in all the States, the money of their patrons (like as the three hundred dollars were obtained in this case after the loss was known, on positive promises of payment without suit), and the consequent necessity imposed upon courts to counteract, in the interest of justice, the wrongs resulting from these practices of foreign corporations whereby they manage to obtain, through these agencies, the money of the people; and then, by repudiating the agencies through which they obtained such money escape from the liabilities which constituted the sole consideration on which they obtain their enormous revenues.

In what we have heretofore said regarding the point as to whether this case is barred by the limitation fixed in the policy, we have assumed that the twelve months named in the policy begin to run *at the date of the fire or loss.*

We now come to quite a different proposition in law, and one upon which we confidently rely.

II.

Although the language of the policy is "unless such suit or action shall be commenced within twelve months next after the date of the fire" (p. 32), *yet this is satisfied if suit is brought within twelve months* AFTER THE CAUSE OF ACTION ACCRUED.

1. The fire occurred May 19, 1884.

2. By the stipulations of the policy the company had sixty days after proofs of loss, to make payment (Rec., p. 27, fol. 53).

3. The appellee had the option for sixty days after proofs were received to rebuild (Rec., p. 31).

4. Therefore, no suit could be instituted until the expiration of the sixty days.

Assuming that the proofs were made the very day of the fire, May 19, 1884, no right of action would accrue to the appellant until *July 19, 1885*.

5. The bill was filed *July 10, 1885*, less than twelve months after the cause of action could possibly have accrued.

In all policies, like the present one, where a time is fixed at which a right of action accrues, and which time is subsequent to the loss, there the limitation fixed by the policy (in this case twelve months) does not begin to run until the time arrives at which the policy gives a right of action.

In the present case the policy allows no right of action until after the expiration of the sixty days after the proofs of the loss, which are required by the company, shall have been made (Rec., 27, fol. 53).

If the proof of the actual value of the loss in this case were made immediately after the fire, on the 19th of May, 1884, no right of action accrued until the 19th of July, 1884, and the present suit was commenced, as already remarked, on the 10th of July, 1884, which was less than twelve months after the right of action accrued.

Now, in support of the proposition that the twelve months begin to run from the time when, in this case, the right of action accrued, we refer to the following cases:

In the case decided in the Circuit Court of the United States for the Southern District of Missouri, of Vette *v.* Ins. Co. (30 Fed. Rep., 668), this question came before the Court. The state of the facts and the nature of the policy, and, also, what was decided by the Court, are indicated in the second and third propositions of the head notes; and these read as follows:

"2. Where a provision is inserted in a policy of insur-

ance for the benefit of the insurer, and there is a reasonable doubt as to its meaning, that construction should be given to it which is *most favorable to the assured.*

"3. Where a policy of insurance provides that the loss, if any, should be payable 'sixty days after notice and proof of the same shall have been made, * * * in accordance with the terms and provisions of the policy,' and, also, provided, 'that no suit or action against the company, for recovery of any claim by virtue of this policy, shall be sustainable in any court * * * until after an award shall have been obtained fixing the amount of such claim, *nor unless such suit or action shall have been commenced within six months after the loss shall have accrued,' held, that the six months did not begin to run at the date of the loss, but at the time when the right to sue accrued.*"

The opinion is by Thayer, J. (p. 669, 670), and on this point states as follows:

"But when does the period of limitation begin to run, in view of other stipulations in the policy? It would seem reasonable to so construe the stipulation as to give the assured the full term of six months in which to sue, after a right to sue has accrued, and this, I think, was the intent of the parties to the contract. The loss is not payable until sixty days after proofs are furnished; and, by a further provision, the assured is deprived of his right to sue until an award has been made, fixing the amount of the claim. In the meantime, according to defendant's theory, the limitation prescribed by the policy is running against the demand, and barring plaintiff of his remedy, although the time has not arrived when it is possible for him to maintain an action. Ordinarily, a statute of limitation does not begin to run until a right of action has accrued; that is to say, until the plaintiff has full liberty to sue, if he is so inclined; and I see no good reason for construing the special statute of limitations, imported into this contract, in such way as to make it operative during a period when, by virtue of other stipulations of the contract, the right of action is suspended. There is another consideration which supports the view above expressed. The stipulation in ques-

tion, limiting the right of action to six months after the loss occurs, is a provision, inserted for the *special benefit of the insurer*. If, then, by comparing the stipulation with other provisions of the policy, a doubt arises as to the time when the limitation begins to run, that construction ought to be given (if it be a reasonable construction) which is *most favorable to the assured*, against whom it was intended to operate. The view which the Court has taken seems to be in harmony with the views expressed by other Courts on the same question."

Vide Steen *v.* Niagara Fire Ins. Co., 89 N. Y., 315.
Mayor, etc., *v.* Hamilton Ins. Co., 39 N. Y., 45.
Chandler *v.* St. Paul Ins. Co., 21 Minn., 85.
Spare *v.* Home Mut. Ins. Co., 17 Fed. Rep., 568.
May Ins., sec. 479.

What is decided, on the present point, in the case of Steen *v.* Ins. Co., 89 N. Y., 315, cited in the foregoing opinion, is thus expressed in the head note:

"Defendant issued a policy of fire insurance, which limited the time for bringing an action upon it to a 'term of twelve months next after the loss or damage shall accrue.' A loss was not payable under it until *sixty days after the proofs required by it 'shall have been received at the office of the company in New York, and the loss shall have been satisfactorily ascertained and proved.'* In an action upon the policy, *held*, that the period of limitation prescribed *did not commence to run until the loss became due and payable and the right to bring the action had accrued;* and so, that an action brought within twelve months after the *expiration of sixty days* from the time of the loss was not barred by limitation. Johnson *v.* H. Ins. Co. (91 Ill., 93, 33 American Rep., 47), Fullam *v.* N. Y. U. Ins. Co. (7 Gray, 61) disapproved.)"

To the body of the opinion, which is by Danforth, J., we ask especial attention. Certainly the reasoning of the Court as found at pages 333 *et seq.* (89 N. Y.) establish, by what seems to be quite conclusive force, the proposition that a limitation, in policies of this description, cannot, reasonably, be held to begin to run until

the time when the right to sue shall have accrued under this policy. This reasoning we need not here repeat. The Court cites in support of the position it takes, in this regard, the case of Ames *v.* Ins. Co., 14 N. Y., 253; Mayor, etc., *v.* Ins. Co., 39 N. Y., 45; Hay *v.* Ins. Co., 77 N. Y., 235. The opinion in the case is thorough and quite exhaustive. We beg to it the careful attention of the Court.

The case of Spare *v.* Home Mut. Ins. Co., 17 Fed. Rep., 568, was decided in 1883 in the Circuit Court for the District of Oregon, and the opinion is by Deady, J.

In that case the same question arose as in Steen *v* Ins. Co., in 89 N. Y., 315, and in Vette *v.* Ins. Co., 30 Fed. Rep., 668. The following proposition of the syllabus indicates the character of the policy and of the decision:

"A policy of insurance against fire, issued by the defendant, provided that a loss thereunder should be payable sixty days after proof thereof; and that a suit for recovery of any claim under the policy should be brought within twelve months after the loss occurred. Held, *that the twelve months did not commence to run until the loss was due and payable—the expiration of sixty days after the proof of the same.*"

In the body of the opinion, after citing the cases in 4 Sawyer, 594, and 7 Wallace, 389, and May on Insurance, Sec. 478, holding that a statute of limitations, in a policy, is valid, the Court proceeds in these words, speaking of the contention of the defendant:

"But they (counsel for the defendant), contend that it (clause regarding limitation) must be read in connection with that other clause which provides that a loss does not become payable until sixty days after the proof of that fact is made; and that, taken together, the reasonable construction of them is that the right to sue on the policy, being postponed until the loss is payable—namely, sixty days after proof thereof—the twelve months' limitation upon such right does not commence to run until the

time. *This construction is supported by the decided weight of authority, and in my judgment is correct on principle.*"

Mayor, etc., *v.* Hamilton Fire Ins. Co., 39 N. Y., 45.
Hay *v.* Star Fire Ins. Co., 77 N. Y., 658; (S. C., 37 American Rep., 800.)
Chandler *v.* St. Paul F. & M. Ins. Co., 21 Minn., 85.
Steen *v.* Niagara Fire Ins. Co., 89 N. Y., 315; (S. C., 42 American Rep., 297.)
May Ins., Sec. 479.

We beg the attention of the Court to the cases cited in the notes to section 479 on the last edition (2d) of May on Insurance, pp. 727, 728.

It seems to us quite unnecessary to multiply authorities upon the present point, because if the reasoning of the Courts, which is found in the cases just cited, and the nature of the subject matter are insufficient for the establishment of the proposition now asserted, that the limitation of twelve months begins at the time when the right of action first accrued, then any multiplication of authorities on the point cannot, in this court, be useful.

III.

The point made by the demurrer, that *there is no liability, because the receiver was not authorized by the Court to insure the property in question, is insufficient:*

1. Because, as appears by the bill, that the receiver was directed by the Court "to take possession of, manage, control, and safely keep" this property. (P. 21.)

This is admitted by the demurrer, and, we submit, is sufficient authority to insure.

2. Because the appellee is estopped to question the authority of the receiver to insure, by the fact of making

the contract, and receiving and keeping the premium paid, $300; there is no indication in this record of any disposition to return this money.

Such a manifestation of bad faith cannot receive any encouragement in a Court of Equity.

The Court below did not notice this point made by appellee.

We respectfully submit that the order sustaining the demurrer should be reversed, and the Court below directed to overrule it.

S. SHELLABARGER,
J. M. WILSON,
For Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 311.

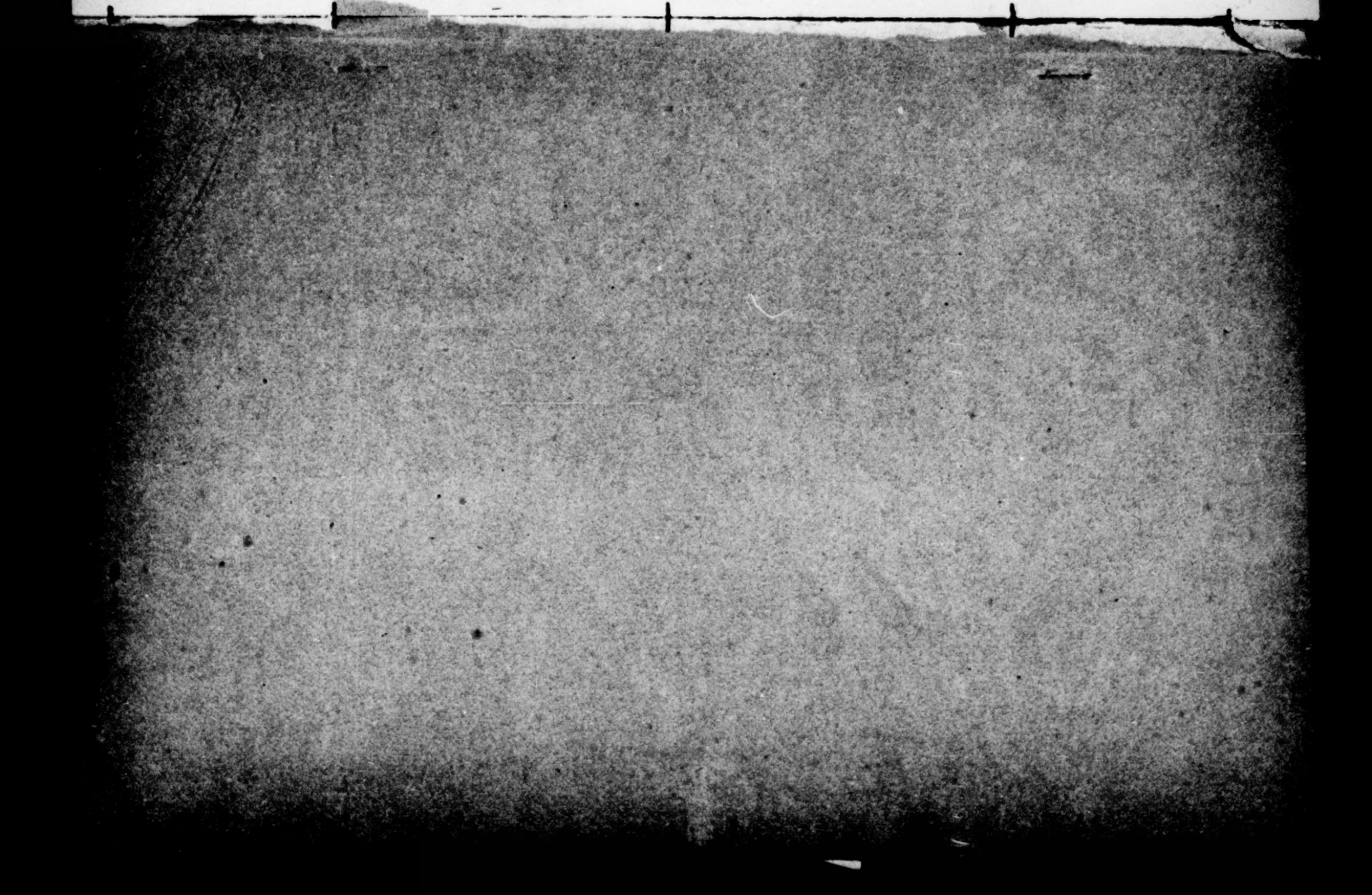
D. P. THOMPSON, RECEIVER,
Appellant,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK,
Appellee.

Appeal from the Circuit Court of United States for the District of Oregon.

BRIEF OF APPELLEE.

ROBERT RAE,
ATTORNEY FOR APPELLEE.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.



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D. P. THOMPSON, RECEIVER, *Appellant*,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, *Appellee.*

Appeal from the Circuit Court of United States for the District of Oregon.

BRIEF OF APPELLEE.

The substance of the amended petition is that the appellant Thompson, on the 19th day of May, 1884, was appointed receiver in the suit of *Ben. Holladay* v. *Joseph Holladay*, in the Circuit court of the State of Oregon, for Multnomah county.

That from the 17th of November, 1883, Edward S. Kearney was the receiver till the 19th day of May, 1884, in the case of *Holladay* v. *Holladay*; that since the 17th of November the Clarendon hotel, in the city of Portland, on the north-west corner of North First and F streets, being a four-story frame building, together with the furniture therein, was in the joint possession of the said Circuit court by its receiver in this case,

and Joseph N. Dolph and R. Koehler owners of one-half interest, and the remaining half interest being in dispute in the Holladay case.

That on the 21st of April, 1884, said Kearney, receiver, insured, for the benefit of whom it might concern, one-half interest in the building the sum of $4,000, and $1,000 like insurance on the furniture, whilst said interests in said property were in suit; that it was on the 21st of April, 1884, between the defendant and receiver, that the defendant would insure against loss by fire, the receiver in the suit of *Holladay* v. *Holladay*, and his successors, for the benefit of whom it might concern, in the amount of $4,000 insurance, to run for one year from the 27th of April, 1884, premium $300, evidenced by policy delivered to said Kearney; that the policy by mistake was made payable to Edward S. Kearney individually, instead of as receiver, etc., as aforesaid.

That said insurance company knew all these facts the time it entered into said contract, and that by mere inadvertence, accident and mistake in writing said policy, it was omitted to be inserted in said policy that said insurance was made by said receiver as receiver.

That on the 14th day of May, 1884, Kearney was removed as receiver, and Thompson appointed and qualified on the 19th of May, 1884.

That on the 19th day of May, 1884, at night, after Thompson was appointed and qualified as receiver, but before the property was delivered over by said Kearney to said receiver, the property was destroyed by fire, and the loss on said half interest amounted to $9,000 on said hotel, and $3,000 on the furniture.

Prays for reformation of the policy.

To this amended bill the Phenix Insurance Company appeared on the 5th day of December, 1885 (Rec., 33, Folio, 64), and filed its demurrer. First, on the ground that the amended bill did not show equity. Second, that it did not show Edward S. Kearney, who had been receiver prior to the date of loss by fire and the appellant's predecessor in office, was at the time of the making of the alleged contract with the defendant, in the complainant's amended bill described, authorized by the Circuit court of the State of Oregon for the county of Multnomah, to enter into such alleged contract. (Rec., 34.) Third, that the amended bill contains no matter showing the appellant's right under the alleged contract with the defendant in said amended bill described is barred, because the receiver did not commence the suit within 12 months after the date of the fire in which the loss described in said bill occurred, prays that the bill be dismissed and defendant have his costs, etc. (Rec., 34; Folio, 66.)

I.

The original receiver as such had no authority to incur expenses on account of the property trusted to his charge by the court beyond what are absolutely necessary to its preservation and use. *Cowdry* v. *Galveston, H. and H. R. R. Co.*, 93 U. S., 352. Beach on Receivers, § § 249, 257.

Unless the court gave special instructions or power to the receiver to incur liability for insuring property against fire which was intrusted to his charge, he has no authority to bind such property, or the owners thereof, upon any collateral contract, such as insurance, etc. A general

agent has no such authority in the absence of some general usage or custom prevailing in the business which authorizes him to make such insurance.

The amended bill does state that the assured and the defendant entered into an agreement to insure the contestants in the litigation of *Holliday* v. *Holliday*, and that the policy of insurance issued to Mr. Kearney was not intended to insure him but "whom it might concern," but states that by accident and mistake the defendant insured him. An attempt is made to set up a state of facts which might be evidence that such a purpose would not have been unreasonable and might possibly have been contemplated without doing violence to some probability, but none so probable as that Mr. Kearney intended to insure himself against liability; yet the provisions of the policy itself have a clearer and more direct signification than that contended for by the appellant. A special note is made in a very conspicuous place in the body of the policy, in which it is provided that "property "held in trust" is intended among other things, "property held under the appointment of a court of law," and also "in case of loss of property held in trust the "names of the owners and their respective interests shall "be stated in the policy." It is but fair to presume the receiver was intelligent enough to be able to read and understand his policy, and that when he came to these clauses he might have realized that as he had insured this property in his own name it might be better to, if he intended otherwise, as he held it under the appointment of a court and in trust, to have it expressed in the policy "as property held in trust," and have given the name and interest of the owners. He, however, was content to secure himself against any liability he

might incur from negligent fires for which he might in some way be held liable. He knew that the contestants might each for himself insure his own interest, and that his own duty referred to the custody and care of the property, and there was no duty upon him to make collateral contracts for the protection of the litigants and not for the care of the property itself. He paid no premium out of the funds of the receivership and might, without an order of court to do so, have found some valid objections by the successful party in having the payment allowed. Whatever may have been his views on the subject the bill is silent that he ever took any steps to insure any one but himself. The most that can be claimed is that the insurer insured Mr. Kearney, receiver, and while he remained receiver, (which, bowever, is not claimed), but the appellant does not stop here, but without any allegation that Mr. Kearney and the company ever agreed to insure any one else, the court is asked that the contract to insure Mr. Kearney be reformed, and that a new agreement be substituted, whereby the insurance company agrees to insure Mr. Kearney and his successors in the office of receiver, for the benefit of whom it may concern. The personal insurance which is of such transcendental importance in the business of insurance is here wholly ignored, and the court is asked to ingraft upon this policy terms which introduce an independent and unusual consideration of insurance, without even the most vague and general allegation in the amended bill, that the receiver was authorized by the court to make, and the parties to the contract ever entered into such an agreement, and in violence of the terms of the policy itself expressly warranting against a change in the care and control of the property. The

policy expressly provides "that if the property be trans-"ferred, or if any change take place in title or possession, "whether by legal process or judicial decree, the policy "shall be void."

Now if this policy is to be reformed and to stand as in insurance "for the benefit of whom it may concern," it is at once turned into an open policy or open letter of insurance indemnifying whoever may be the owner at the time of loss, and thus strict and material warranties against change of title, possession or control, become canceled and blotted out. To do all this the whole body of the policy would have to be rewritten. a

In *Harper* v. *Robinson*, 98 U. S., 528, the court say, in speaking of this clause: "It is now clearly established "that an insurable interest, subsisting during the risk and "at the time of the loss, is sufficient, and that the assured "need not also allege or prove that he was interested at "the time of effecting the policy."

If any such agreement was first authorized and made, it should be first set up in the bill of complaint, and then should follow that by accident and mistake such agreement was not truly set down, and that all the warranties against change of risk were by mistake allowed to remain in the body of the policy. The bill makes no allegation of any such authorized agreement on the part of the receiver, and as a consequence the demurrer does not admit it. For these reasons the demurrer should be sustained. If the insurance was to Mr. Kearney—receiver. it certainly was not "to his successors or for the benefit of whom it may "concern."

a- Meisenkel et al. vs St Paul Fire M. Ins. Co. 19 Chic Law Journal p. 100.

Howland vs. Blake 97 US. 624.

II.

No suit was brought upon the policy of insurance sued on in this case until long after a year had expired from the date of the loss by fire, out of which the cause of action grew. There is no allegation in the bill that the defendant, the appellee, said or did anything to warrant the assured in delaying his suit. No such excuse whatever was set up, but on the contrary the record discloses that the insurance company, upon notice of the loss by fire, at once notified the appellant, that by reason of the removal of Mr. Kearney, the receiver, and the loss of that personal care and fidelity which they trusted in him, it denied all liability. It, while considering its liability, held out no hopes of amicable adjustment which might operate as a waiver of this condition limiting the time for bringing suit, but on the contrary dispensed with all proofs of loss and all preliminary adjustments, and broadly avowed its non-liability. *Gooden* v. *Amos Keag F. Ins. Co.*, 20 N. H., 73.

In such cases it was the duty of the receiver, if he supposed there was any existing liability for any loss by fire, by the terms of the policy to have at once, promptly and without unreasonable dely, commenced suit. Having failed to do so, and offering no legal excuse for his neglect, he is barred by that provision of the policy which limits his right of action twelve months from the date of the fire.

The latest case on the subject is *Howard Insurance Co.* v. *Hocking*, decided by the Supreme court of Pennsylvania on November 4, 1889, and reported in Volume 18 of the Atlantic Reporter.

See also, *Riddellburger* v. *The Insurance Co.*, 7 Wallace, 386; *Wilkinson* v. *The Insurance Co.*, 72 New York, 499; *Arthur* v. *The Insurance Co.*, 78 New York, 462.

May on Insurance, § 485, lay it down: "Nor will the "operation of such limitation be suspended or prevented "by negotiation for a settlement, *if there be no agreement* "*for delay* and the plaintiff has done nothing to mislead "the plaintiff."

The amended bill seeks to plow around the decision of the court in sustaining the demurrer to the original bill, and dismissing his bill on account of the action not having been brought within the time limited in the policy.

It is alleged in the amended bill, that about thirty days after said fire, the agent of the insurance company directed the attention of the appellant to the provisions in said policy limiting the commencement of the suit; that said agent stated, at that time, that there was no question made as to the loss or to its payment, except that the company was considering the fact that a change had occurred in the receivership in the case of *Holliday* v. *Holliday*. This, of course, waived proofs of loss, if not already made, and the only question the company was considering was a question of liability on account of a change of receivership. The agents stated, about thirty days after the fire, that they had already written the company giving the company their advice, which was to pay the appellant, and such was the good opinion they held of their persuasive powers, that they were of an opinion that the company would pay. This, however, is but an expression of an opinion and a mere expectation, but while the company held the matter under advisement, and the appellant knew this, the agent even by

an express promise could not bind the company. The receipt of the earned premium some thirty-nine days after the loss, by the agents, while the company was holding the matter under advisement was a weak invention to forestall the company's decision and to raise a promise on its behalf to pay; but the inference must be the other way. If the company admitted its liability, then it owed the appellant some $5,000 less the premium at the time the agent received the premium, and it is hardly credible that the appellant would pay or the appellee receive the premium under such circumstances. If the liability is admitted, the company would have paid the loss if it determined to become liable. The agent by the receipt of $300 earned premium, could not, unless expressly authorized, with the appellant's knowledge of the antecedent facts, bind their principal to the present and immediate payment of $5,000. Yet conceding this not to be so, and the agents could step in and thus supersede and bind their principal, the provision in the policy that the suit must be commenced within twelve months from the date of the fire, was still operative. The opinion of the agents had not been verified that the company would decide to pay, and there is no allegation that it ever so stated to its agents or the appellant. An equivocal allegation is made that the said agents gave assurance that the company would pay "as aforesaid," but the "as aforesaid" is carried back to the agents' opinion that their advice in their letter would be successful. Nor does the amended bill allege that these unauthorized promises of the agent prevented the appellant from obtaining leave of the court to bring this suit on the policy within the period fixed from the date of the fire, but only that they had prevented him "for some "time," after sixty days after the delivery to said defend-

ant of the proofs of the loss, which occurred thirty days after the fire and twelve months and twenty-one days before the commencement of the suit, from seeking relief by suit on the policy. No other excuse is offered or found in the record, and the learned judge in the court below, was fully justified in finding that these pretended excuses were not sufficient to waive the express provisions of this policy in this respect.

The policy in this case limited the authority of the agent, and by such limitation took away all implication of a general authority. The policy provides that "it is understood and agreed that agents of the company have no "authority in any manner, or by any act or omission "whatever, either before or after making the contract to "waive, alter, modify, etc., any of its conditions or restrictions."

The meaning of this is clear, that the person acting as agent for some purposes, has no authority to represent the insurer in any manner that would waive, alter, or modify the terms of the contract as reduced to writing.

It limits such agent merely to an agency to receive and forward the application for insurance, deliver the policy and receive the premium.

Wood on Insurance, 1st Ed., page 640.

Bohart v. *Obering*, 13 Kansas, 388.

May on Insurance, page 156.

Walsh v. *Hartford Insurance Co.*, 7 Ins. Law Journal, 423.

1st National Bank of W. v. *Lancashire Ins. Co.*, 14 Ins. Law Journal, 278.

Kyte v. *Commercial Union Ins. Co.*, 10th N. E., 518.

Hankins v. *Rockford Ins. Co.*, 35 N. W., 34.

The court will bear in mind in construing an insurance agent's powers, that a clear and sharp distinction has ever been preserved in giving effect to a claim of waiver of the provisions of the policy which he represents; that a more liberal construction will be given to such powers at the time of making the contract and delivering the policy, and facts and circumstances preliminary and leading up to the consummation of the contract of insurance. After the contract has been made and the contract delivered to the assured, and he has every opportunity to become familiar with its provisions, in treating of conditions subsequent, the power of the agent to waive provisions in the policy, except in the manner pointed out by the policy itself, are more strictly construed. Both parties then stand upon a more equal footing, and the assured is presumed to be possessed of a fuller knowledge of his right than at the initiatory negotiations. After the contract of insurance has been fully made and executed, and a loss has occurred which exhausts the face of the policy, the agent has no authority *per se* whatever to enlarge the scope of the insurer's liability, nor in any way is he its agent to waive, alter or modify any of the provisions of the policy which shall relate to the loss itself, the liability, or the limitations of the manner or time in which the liability may be enforced.[a] It is true, a new power may be expressly conferred upon the agent to do all these things, but the law will not infer it, and the amended bill nowhere alleges any such thing, nor does it allege that the promise made by the pretended agents more than a year before the commencement of the suit, that the company would in all probability pay the loss, was known or authorized by the company, nor is it alleged in the bill that any act or thing or promise done by the agents was

a- Barre vs. Council Bluffs Ins. Co. 19 Ins. Law Journal 260.
Hollis vs. Ins. Co. 65 Iowa 454.
Hudson vs. Hekla Fire Ins. Co. 19 Ins. Law Journal 237.
Hankins vs. Ins. Co. 70 Wis. 1.

known or authorized by the defendant. The agents as to this loss after it occurred were strangers both to the assured and the insurer, and the appellant was informed by these agents more than twelve months prior to the commencement of the suit, that the company itself was handling the question of liability and the settlement of the loss, and it nowhere appears that other information inconsistent with this was ever by the company or the pretended agents communicated to the appellant.

With tnese limitations of authority in the policy, the burden of proof is upon the assured to show that the acts relied upon were within the scope of the agents' apparent authority.

Wood on Ins., 2nd Ed., Sec. 420.

Lohues v. *The Ins. Co. of N. A.*, 6 Ins. Law Journal, 472.

Bush v. *Westchester Fire Ins. Co.*, 5 Ins. Law Journal, 207.

Bozdin v. *Heckla Fire Ins. Co.*, 16 Ins. Law Journal, 305.

Cleaver v. *The Ins. Co.*, 2 N. W., 660.

But whether these agents were general or special, with powers limited or unlimited, all such agencies are subordinate to the right of their principal to interfere and assume control, and where the assured knows, or has notice that the principal has taken the matter in hand, and is itself determining its liability and the manner of satisfying it, the general or special agent has no authority to in any way bind his principal, unless he is duly authorized by such principal, and the party dealing with him negotiate at their peril after such notice that the principal is so acting, and take the risk of his authority.

The property in this case was the subject of family quarrel and of rival pretentions, and to save the property from the marauding devastations of either faction, a receiver was appointed, and a personal contract was made between him and the insurance company in reference to the property, covering any risk he might run from careless fires, and which contract, were it not for the personal confidence reposed in the assured, no prudent underwriter would willingly have taken.

It is a significant fact that on the night of the day that the assured, the first receiver, was discharged and the appellant was appointed and qualified, the property was destroyed by fire. The opinion of the court below is found in the record, page 16, also reported in 25th Fed. Rep., 296.

Respectfully submitted.

ROBERT RAE,
Atty. for Appellee.